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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-4661

CRESTWOOD EDUCATION ASSOCIATION, GORDON S. KLEMCZAK, THOMAS NOWAK, JOAN WEBER, MORRIS STOLOV, CHRISTINA HAMRICK, JOHN LUNDBERG, RICHARD HORVATH, MILES WINN, JOHN DOE and MARY ROE,
Appellants,

vs.

THE BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF CRESTWOOD,
Appellee.

JURISDICTIONAL STATEMENT

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

LEVIN, LEVIN, GARVETT and DILL
By: Erwin B. Ellmann
Attorney for Appellants
1250 City National Bank Building
Detroit, Michigan 48226

Interstate Brief & Record Co., 1036 Beaubien St., Detroit, Michigan 48226
962-8745—962-8732

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Appellants,

vs.

THE BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF CRESTWOOD,
Appellee.

JURISDICTIONAL STATEMENT

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

Appellants appeal from a decision of the Supreme Court of Michigan, (three justices dissenting), on April 4, 1975, upholding the validity of Section 6 of Michigan's Public Employment Relations Act, MCLA 423.206; MSA 17.455 and denying relief to some 184 public school teachers summarily discharged from their employment. Petition for rehearing, filed before entry of a formal order therein,

was denied by order of the Supreme Court of Michigan, June 25, 1975, and by amended order, July 16, 1975, one justice dissenting, two justices not participating. This Statement is submitted to show that this Court has jurisdiction of the appeal and that a substantial question is presented.

OPINIONS BELOW

The opinion of the Supreme Court of Michigan is reported in 393 Mich 616, 227 NW2d 736. The orders denying rehearing were without opinion. The opinion of the Circuit Court for the County of Wayne is unreported. The opinion of the Michigan Court of Appeals is reported in 57 Mich App 636 (1975). The orders denying rehearing were without opinion. Copies of the opinions and orders are set forth in the Appendix.

JURISDICTION

In an equitable proceeding originally brought against both appellants and appellee by Crestwood taxpayers, appellants sought to enjoin the summary termination of the employment of some 184 school teachers by appellee Crestwood Board of Education, a public agency. A special three-judge panel was convened by the Wayne County Circuit Court which concluded, one judge dissenting, that Section 6 of Michigan's Public Employment Relations Act required a hearing prior to discharge of tenured teachers and enjoined their discharge prior to such hearing. A three-judge panel of the Michigan Court of Appeals also concluded that the discharges were procedurally improper. A majority of the Supreme Court of Michigan reversed,

holding that a "limited inquiry" before the school board, if requested by a teacher after he was discharged by the board, complied with Section 6 of the Act and did not violate the federal Due Process Clause. Prior to entry of a formal order, rehearing was sought because the court's construction of Section 6 made it inconsistent with the Due Process Clause. Rehearing was denied, by order June 25, 1975 and amended order, July 16, 1975, and notice of appeal was filed September 4, 1975. The validity of a state statute being drawn in question as being repugant to the Constitution of the United States, and the highest court of the state having decided in favor of its validity, this Court has jurisdiction on appeal, 28 USC §1257 (2); *Winters* v *People,* 333 US 507 (1948); *Cohen* v *California,* 403 US 15, 18, reh den, 404 US 876 (1971); *Lawrence* v *State Tax Commission,* 286 US 276, 282 (1931).

STATUTE INVOLVED

Michigan's Public Employment Relations Act, MCLA 423.201 *et seq,* MSA 17.455 (1) *et seq,* deals comprehensively with labor relations in the public sector. Section 2 prohibits strikes in the following language:

> "Sec. 2. No person holding a position by appointment or employment in the government of the state of Michigan, or in the government of any 1 or more of the political subdivisions thereof, or in the public school service, or in any public or special district, or in the service of any authority, commission, or board, or in any other branch of the public service, hereinafter called a 'public employee,' shall strike."

A "strike" is defined in Section 1 as follows:

> "Sec. 1. As used in this act the word 'strike' means the concerted failure to report for duty, the wilful absence from one's position, the stoppage of work, or the abstinence in whole or in part from the full, faithful and proper performance of the duties of employment, for the purpose of inducing, influencing or coercing a change in the conditions, or compensation, or the rights, privileges or obligations of employment. This act shall not be construed to limit, impair or affect the right of a public employee to the expression or communication of a view, grievance, complaint or opinion on any matter related to the conditions of compensation of public employment or their betterment, so long as the same is not designed to and does not interfere with the full, faithful and proper performance of the duties of employment."

Section 6, the provision here in issue, provides:

> "Sec. 6. Notwithstanding the provisions of any other law, any person holding such a position who, by concerted action with others, and without the lawful approval of his superior, wilfully absents himself from his position, or abstains in whole or in part from the full, faithful and proper performance of his duties for the purpose of inducing, influencing or coercing a change in the conditions or compensation, or the rights, privileges or obligations of employment shall be deemed to be on strike but the person, upon request, shall be entitled to a determination as to whether he did violate the provisions of this act. The request shall be filed in writing, with the officer or body having power to remove or

> discipline such employee, within 10 days after regular compensation of such employee has ceased or other discipline has been imposed. In the event of such request the officer or body shall within 10 days commence a proceeding for the determination of whether the provisions of this act have been violated by the public employee, in accordance with the law and regulations appropriate to a proceeding to remove the public employee. The proceedings shall be undertaken without unnecessary delay. The decision of the proceeding shall be made within 10 days. If the employee involved is held to have violated this law and his employment terminated or other discipline imposed, he shall have the right of review to the circuit court having jurisdiction of the parties, within 30 days from such decision, for determination whether such decision is supported by competent, material and substantial evidence on the whole record."

QUESTION PRESENTED

Is a state statute which permits summary discharge of a public school teacher having property rights in his employment without notice of charges or opportunity to be heard prior to termination, and thereafter permitting, only on timely request of the employee, a "limited inquiry" before the same employer repugnant to the Fourteenth Amendment?

STATEMENT

Appellant Crestwood Education Association (the CEA) is a labor organization which for many years has been the certified exclusive bargaining representative of all public school teachers in the School District of Crestwood, Michigan. The individual appellants are teachers in the district and officers of the Association.

The last collective agreement covering terms and conditions of employment between the CEA and appellee Crestwood School District Board of Education expired in August, 1973. Teachers worked without a contract for the 1973-1974 school year; sporadic and fruitless negotiations took place and classes did not resume during the 1974-1975 school year until the teachers were ordered to work by the circuit court on October 8, 1974. A further circuit court order prohibiting teachers from striking was issued October 22, 1974. After the Thanksgiving recess, classes again did not resume. On December 20, 1974 appellee school board passed a resolution offering teachers the "option" of reporting for work on Friday, December 27, 1974,[1] or "submitting a letter of resignation" by such day. On December 30, 1974, the Board passed a further resolution indicating that because it considered that some 184 named teachers "failed to comply with the above options", failed to report for work on December 27th, and "have participated in an illegal strike", they "shall be deemed to have and are terminated from their employment status in the

[1] The period between Christmas and New Year's Day is normally a vacation for both students and teachers in Michigan schools. No students were directed to report for classes on December 27th in Crestwood and no Michigan school district operated on such day.

Crestwood School District effective December 27, 1974." The teachers' employment was thus terminated without prior filing of any charges against any teacher for engaging in any prohibited action in violation of Sections 1 and 2 of the Act or providing any opportunity to any teacher to be heard.

The CEA thereupon sought equitable relief in the pending circuit court action. In a motion for injunction, appellants alleged that,

> "All public employees are entitled, by reason of the Fourteenth Amendment to the United States Constitution and the due process clause of the Michigan Constitution to notice, reasonable opportunity to defend, and a hearing before a fair and impartial tribunal, prior to termination or deprivation of employment and personal and property rights and liberties pertaining thereto."

The circuit court alluded to this contention but found it unnecessary to pass on the constitutional issue since it construed Section 6 to require a prior hearing in accord with the Tenure of Teachers Act (App. 42). Its order directed revocation of appellee's resolution of December 30, 1974, reinstatement of all teachers and the taking of steps necessary to effect resumption of classes.

When appellee brought the matter to the Court of Appeals, appellants sought affirmance and a major segment of their brief was entitled:

> "IF SECTION 6 OF THE PUBLIC EMPLOYMENT RELATIONS ACT PURPORTS TO AUTHORIZE THE TERMINATION OF EMPLOYMENT OF A STRIKING TEACHER WITHOUT PRIOR HEARING BEFORE AN IMPARTIAL

DECISION-MAKER, IT VIOLATES THE DUE PROCESS CLAUSE OF BOTH FEDERAL AND STATE CONSTITUTIONS."

The lower court decision was affirmed with modifications, the Court of Appeals avoiding the constitutional question by holding that under Section 6 the lack of a hearing prior to termination was improper.

In seeking to uphold the determinations of the two lower courts, after appellee's petition for review was granted, appellants again emphasized in their brief in the Supreme Court of Michigan (p. 18):

> "If Section 6 of PERA is construed to permit termination of the employment of teachers such as defendants prior to the filing of charges, notice and hearing before an unbiased and impartial tribunal, *Morrissey* v *Brewer*, 397 US 254, 271 (1969); See also *Ward* v *Monroeville*, 409 US 57 (1972); *In re Hutchinson*, 349 US 133, 136 (1955), it is patently unconstitutional. Section 6 would have to be struck down as relentlessly as was the ten-day suspension statute of Ohio in Goss v Lopez,— US —, 43 LW 4181 (Jan. 22, 1975)."
>
> At the outset the Supreme Court of Michigan recognized that a constitutional issue was squarely presented (393 Mich at 624, App 56) but found no constitutional infirmity in the act (393 Mich at 633-634, App 66-67).

In seeking clarification or rehearing from the Supreme Court of Michigan, following its opinion, appellants reiterated in their motion (par. 1) that, as they "have urged throughout", a state statute construed to permit termination of employment without prior hearing "violates the due process clause of both state and federal constitutions." It was also alleged (par. 4) that "Section 6, as interpreted by the Court, does not assure a discharged employee a hearing before an impartial and unbiased decision-maker, as is mandated by the Fourteenth Amendment." These contentions were rejected without comment.

1. There is no question that the 184 affected teachers, constituting the vast bulk of the Crestwood faculty, had such interests in their employment that deprivation of their jobs by the state must be measured by the demands of the Fourteenth Amendment. *Perry* v *Sindermann*, 408 US 593, 601 (1972); *Board of Regents* v *Roth*, 408 US 564, 573, 577 (1972); *Arnett* v *Kennedy*, 416 US 134 (1974); *Goss* v *Lopez*, 419 US 565 (1975). Many of the teachers had been employed in Crestwood for many years; all had completed college or university training and met professional certification standards imposed by the state. All had an interest in protecting their chosen careers and maintaining their professional reputations, particularly in a period of vast teacher unemployment; dismissal as lawbreakers did not leave them "as free as before" to find other teaching jobs.

All were teaching during the 1974-1975 school year either under individual "continuing contracts" or written contracts of hire for the year pursuant to MCLA 340.569; MSA 15.3569, a provision of the School Code protecting against dismissal except "for reasonable and just cause after a fair hearing." All of the teachers had either acquired tenure or were in the process of acquiring it under the Tenure of Teachers Act, MCLA 38.101 *et seq;* MSA 15.2001 *et seq.* which also protects against summary dismissal. Although appellee belatedly argued that tenured teachers might be treated differently from probationary teachers,

the decisions of none of the courts below hinge on such a distinction and the Supreme Court expressly assumed that "a teacher's statutory rights under the teacher's tenure act constitute property" (393 Mich at 633, App 66).

2. Recognizing the applicability of the Fourteenth Amendment, the Supreme Court of Michigan misconceived constitutional requirements and misconstrued and misapplied this Court's decisions. No decision, so far as we are aware, holds that the Constitution which generally protects teachers accused of incompetence, defamation of superiors, or other misconduct does not protect teachers accused of concerted activity in violation of a "no-strike" law. On the contrary, if under our system "guilt is personal", the individual requires special protection against indiscriminate accusation aimed at large groups of employees. The emotional atmosphere of a labor dispute frequently arouses vague suspicions and precipitates unreasoned and excessive administrative responses. The "nature of the issues at stake" here peculiarly aggravates the risk that the rights of the individual may be disregarded. Cf *Gagnon* v *Scarpelli,* 411 US 778, 787-791 (1973). That the individual is only one of 184 teachers similarly treated does not make his claim to fair treatment by an instrumentality of the state less deserving of consideration. "As long as a property deprivation is not *de minimis,* its gravity is irrelevant to the question whether account must be taken of the Due Process Clause," *Goss* v *Lopez,* 419 US 565, 576 (1975).

3. For a person to be "deemed" to be on strike in violation of Sections 1 and 2 of the Michigan act and thus be subject to discharge under Section 6, no less than the following criteria must be met:

(a) The employee must occupy a position covered by the statute.

(b) His action was not approved by a supervisor having lawful authority to approve.

(c) He willfully absented himself from his job or he failed in whole or in part to perform duties of employment.

(d) The absence or non-performance was part of "concerted action with others".

(e) The purpose of the action or non-action was to secure a change in the employee's conditions of employment.

Thus, not all "strikes" are prohibited by this statute, see concurring opinion in *Warren Education Association* v *Adams,* 57 Mich App 496, 501 (1975), and cf *Mastro Plastics Corp* v *NLRB,* 350 US 270 (1956); *NLRB* v *International Van Lines,* 409 US 48, 51 (1972), and whether a stoppage is to protest unfair treatment by the employer, the educational policies of the state or even a national immigration policy toward teachers, rather than to change employment conditions may require extensive investigation. Further, even if a stoppage is plainly outlawed by Sections 1 and 2, whether an individual employee participated in it involves proof and, frequently, delicate judgment. Cf. *North American Coal Corporation* v *United Mine Workers of America,* 512 F2d 238 (CA 6, 1975); *Consolidation Coal Co* v *Local 1784,* 514 F2d 763 (CA 6, 1975).

There were no specifications of charges against any individual teacher beyond the resolution reciting that the listed teachers had violated the act and had refused to accept "options" offered by the employer. The court below apparently sanctioned termination of employment on this basis without the need for any elaboration or particularization of reasons for the employer's decision. This Court has required a higher standard of notification. *Willner* v

Committee on Character and Fitness, 373 US 96, 105 (1963); *Morgan* v *United States,* 304 US 1, 18-19 (1938); *Goldberg* v *Kelly,* 397 US 254, 267-268 (1970).

The court below saw no constitutional objection to the summary termination of teachers' employment without any prior hearing, explanation, or opportunity to defend or even to submit an affidavit demonstrating that the asserted absence from work was for causes having nothing to do with a course of conduct prohibited by the statute. The court found no occasion to determine whether a hearing could be dispensed with because, it noted (393 Mich at 633, App. 66), the statute provides a "hearing" if the discharged employee within 10 days from actual termination or cessation of pay makes an appropriate request for a hearing. We doubt that the constitutional sufficiency of state action depriving the citizen of contractual rights and perhaps his professional career can be permitted to hinge on whether the individual happens to discover within the 10 days the action taken against him[2] or is sophisticated or diligent or alert or moneyed enough to request that the Constitution be observed. Whether a victim is vocal or mute, this Court has rejected the general proposition that "a wrong may be done if it can be undone", *Fuentes* v *Shevin,* 407 US 67, 82 (1972); cf *Bell* v *Burson,* 402 US 535 (1971).

4. The court below took pains to emphasize that the post-termination proceedings under Section 6 might be something less than the full and fair hearing which this Court's prior decisions contemplate. Only what the Court characterized as a "limited inquiry" is authorized, whose "sole purpose" is "to determine whether the employer

[2] Section 6 does not require notice to the employee that he is being disciplined but requires him to request a hearing within 10 days from the imposition of discipline or cessation of compensation. The request may thus come too late and no hearing would ever be held.

correctly identified the particular employee" as a striker (393 Mich at 640, App. 74). Specifically, the court holds that the employee may not in such proceedings assert that this conduct was provoked or compelled by the illegal conduct of the employer (393 Mich at 640).[3] What other limitations on the inquiry the court felt appropriate were left unsaid, thus inviting gratuitous restrictions by public employers impatient to give short shrift to the claims of their discharged workers.

5. The court below also concluded that the "limited inquiry" offered the discharged employee after his discharge is "ordinarily" to be conducted by the officer or body which discharged him (393 Mich at 640). This compounds the constitutional deficiencies of the procedure, for the school board here is not the "neutral and detached body" needed to evaluate the legitimacy of its own action. *Morrissey* v *Brewer,* 408 US 471, 486 (1972). The employer is invited to be the judge in its own case, after it has summarily decided it and defended it with vigor through the entire state court system. In an earlier Michigan proceeding this Court observed that it would be "very strange if our system of law permitted a judge to act as a grand jury and then try the very person accused as a result of his investigation", *In re Murchison,* 349 US 133, 137 (1955), yet

[3] The Michigan court suggests that such questions should be raised by the employee in an unfair labor practice charge against his public employer before the Michigan Employment Relations Commission where, unlike NLRB practice, he will have the entire burden, expense and responsibility of proving a case against a public agency. This "alternative" is hardly an adequate substitute for directly interposing defenses against the employers' claim in a Section 6 hearing that the discharge was proper. In any event, the possibility of other remedies before any other tribunal does not normally cure deficiencies in the procedure by which benefits are cut off. *Fuentes* v *Shevin,* 407 US 67, 82 (1972); *Stanley* v *Illinois,* 405 US 645, 647 (1972).

Michigan's construction of Section 6 here effects an analogous result. Public school boards normally wish to defend their decisions before their constituents; in this case rancorous labor relations for many months, great community concern, and extensive litigation all operate to strengthen appellee's natural resolve to vindicate its own prior judgment. With six of the seven school board posts being subject to election in November, 1975, political futures are more crucially at stake than in *Ward* v *Monroeville*, 409 US 57 (1972) and it is not conceivable that before such a body, the "limited inquiry" could be anything but ritualistic. This is not what "due process" means. *Tumey* v *Ohio,* 273 US 510, 532 (1927); *In re Oliver*, 333 US 257 (1948); *Gibson* v *Berryhill,* 411 US 564, 579 (1973); *Goldberg* v *Kelly,* 397 US 254, 271 (1969).

6. The court below refused to construe Section 6 to require a hearing before termination of the employee, and held that it was free to refuse to do so under prior decisions of this Court (393 Mich at 633, note 15, App. 66). We submit that those decisions point precisely to the opposite conclusion. If a hearing must be held "at a meaningful time and in a meaningful manner", *Armstrong* v *Manzo,* 380 US 545, 552 (1965), if a teacher is to be spared the obloquy of discharge as a law violator, the hearing should precede and not follow the event. If the degree of procedural formality is dictated by the interests at stake, *Boddie* v *Connecticut*, 401 US 371, 378 (1970), the loss of a permanent professional job or the prospect of earning one's livelihood in one's chosen profession must loom high on the scale of priorities. This Court has repeatedly declared that only "emergency situations" justify departure from the principle that the hearing must precede and not follow the act of deprivation. *Bell* v *Burson*, 402 US 535, 542 (1971); *Boddie* v *Connecticut*, 401 US 371, 379 (1970). Decisions to

the contrary, such as those relied upon by the court below (393 Mich at 633, n 15, App. 66), have been limited to what has been characterized as "rare and extraordinary situations"—not the discharge of a teacher. *Board of Regents* v *Roth,* 408 US 564, 569 n 7 (1972). We do not read *Arnett* v *Kennedy,* 416 US 134 (1974), or *Goss* v *Lopez,* 419 US 565 (1975) as announcing a different rule.

The court below construed *Arnett* to mean that "constitutional necessity of a pre-disciplinary hearing must be determined by balancing the competing interests of the government and employee" (393 Mich at 634, App. 67) and that the "predominant interest secured by pre-disciplinary hearings" is protection against removal of the "wrong person" or "protection against interim financial deprivation" (393 Mich at 635, App. 68). This reading trivializes the historic function of the Due Process Clause as a protection of the individual against inappropriate exertion of state power.

Unlike the Michigan act, the federal statute in *Arnett* provided for pre-termination notice of charges, opportunity to file a written answer supported by affidavit and a written decision thereon. Appeal to an impartial body, the civil service commission, was likewise provided. Appellants here had no parallel opportunities before they were "deemed" law violators, and discharged. The factors "balanced" in *Arnett* have scant similarity to those at issue here. If the interest of the teacher in fair treatment is simply to be set against the convenience, economy or efficiency of organized government in carrying on business for the public, the claim of the individual is almost invariably fated to be overridden by the claims of the social order. The supremacy of the state and its interests in governing are thus transformed into a well-nigh "irrebuttable presumption" quite as subversive of the interests of the individual as those struck

down on due process grounds in *Stanley* v *Illinois,* 405 US 645 (1972) and *Cleveland Board of Education* v *LaFleur,* 414 US 632 (1974). Legitimate public concerns may be presumed to motivate most governmental action, even if official zealousness is misplaced but "The Fourteenth Amendment protects the citizen against the State itself and all its creatures—Boards of Education not excepted." *West Virginia Board of Education* v *Barnette,* 319 US 624, 637 (1943). See "Specifying the Proceedings Required by Due Process: Toward Limits on the Use of Interest Balancing", 88 Harv L Rev 1510 (1975).

The precise basis for appellant's discharge, it must be emphasized, was the asserted failure to report to classrooms on Friday, December 27th, during the normal vacation period. The resolution of December 20th, which scheduled the teachers to report on that day, did not advise students to attend. It is plain that appellee's intention was not to provide "normal schooling" but to dramatize its power and authority over its employees, even during the holidy season. School boards may readily employ substitutes to staff classrooms without giving them permanent appointments, as appellee has itself proved after displacing all appellants from their jobs. Under Michigan law, discharge of a tenured teacher for any alleged disciplinary infraction other than striking must be preceded by notice of charges, opportunity to be heard and full appellate procedure under the Tenure of Teachers Act, the accused teacher being continued in active employment or suspended with pay until final adjudication. This procedure—applicable whether one or more teachers are being charged—has long been accommodated without undue stress or inconvenience to public education. The added burden occasioned by indiscriminate mass firings of alleged strikers is not, we believe, a legitimate reason to relieve school boards from the obligation to accord teachers procedural due process. Certainly, loss of the careers of 184 teachers requires as much constitutional solicitude as the suspension of a pupil for less than ten days. *Goss* v *Lopez,* 419 US 565 (1975).

THE QUESTION IS SUBSTANTIAL

The Supreme Court of Michigan gave final authoritative construction to Section 6 of the Public Employment Relations Act, a statute applicable to perhaps half a million employees in Michigan. The views of the majority have given sanction to the loss of employment of some 184 individual teachers in the Crestwood School District. We believe the issue raised by this appeal is substantial and of public importance.

Respectfully submitted,

Erwin B. Ellmann
Attorney for Appellants
1250 Penobscot Building
Detroit, Michigan 48226
962--9400

Dated: September 23, 1975.

APPENDIX A

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF WAYNE

No. 74 031 615 CL

GEORGE N. ROCKWELL and VIOLET P. ROCKWELL,
Plaintiffs,
vs.
THE BOARD OF EDUCATION OF THE
SCHOOL DISTRICT OF CRESTWOOD,
Defendant-Cross-Plaintiff,

CRESTWOOD EDUCATION ASSOCIATION, GORDON S. KLEMCZAK, THOMAS NOWAK, JOAN WEBER, MORRIS STOLOV, CHRISTINA HAMRICK, JOHN LUNDBERG, RICHARD HORVATH, MILES WINN, JOHN DOE and MARY ROE,
Defendants-Cross-Defendants.

OPINION OF THE WAYNE COUNTY
CIRCUIT COURT

BEFORE: HONORABLE J. G. RASHID, G. E. BOWLES and T. ROUMELL, Circuit Judges

(January 9, 1975)

Judge Rashid: I wish to begin by announcing to you that the gentlemen seated at my left and right respectively, my colleagues, were appointed and selected not by me but by the Presiding Judge. And, I am personally delighted with their selection. They are very able gentlemen.

Now, I want to say to you that we worked yesterday afternoon as a unit, that is the three of us and we worked even separately last night. I believe that is quite accurate. I know I did and I know both of the gentlemen did as well.

I think rather than being at all evasive I am going to begin my comments by announcing to you that we are not unanimous in our determination. As you will see later, Judge Roumell and Judge Bowles have agreed, I have dissented. What I am about to give you now is my dissenting opinion.

I have lived with this case since September or earlier as the lawyers well know—a series of hearings extensive in length, the entry of a series of orders.

Let me begin by pointing out that as far back as October 8th I entered an order, after hearing, that the teachers of the Crestwood School District shall return to work October 8th, 1974, at the regular start of the school day. At that time I further ordered that the Board shall implement the terms of this proposed salary schedule of October 6th, 1974 and that all teachers in the Crestwood School District shall be paid in strict accordance with that schedule which is a part of the record. And, I am reliably told and it is not denied that they were paid in accordance with that offered schedule.

In that same order I provided that negotiations between the parties shall resume October 8th, 1974, in the hours of 6:00 p.m. to twelve midnight, and said negotiations shall continue during the above hours from October 8th until October 21st, 1974 with the exception of all Sundays which may fall within that period.

I further ordered that the membership of the Crestwood Board of Education shall attend all negotiation sessions between the parties in accordance with the above schedule together with the said Board's Negotiating Staff.

The order provided for the appointment of a mediator.

Then, thereafter, on October 24th, 22nd rather, I entered a second order, ordering that the teaching staff of the Crestwood School District are enjoined and prohibited from striking under any guise or color and refraining from regular performance of their employments in accordance with the hours of employment as set forth by the School District.

That order further provided that this injunctive order shall remain in full force and effect until the further order of this Court.

Subsequent to that and notwithstanding this order the teachers did not return to work and we later agreed upon a restrictive order with respect to picketing, which is for the moment not necessarily material, but on December 9th there was a show cause before me why the teachers should not be found in contempt for violating my order. We took testimony several days, on December 9th, 1974, on December 10th, 1974, December 12th, 1974, December 16th, 1974, December 17th, 1974, the hearings were concluded and I found a group of teachers who were named guilty of contempt.

I ordered them to serve three days in the County Jail or pay a fine of $200.00 and I gave them the opportunity to purge themselves by Friday, December 20th, 1974, at 10:00 a.m. by returning to work. Rather than returning to work on December 20th of 1974, at 10:00 a.m. the teachers came in and paid their respective fines of $200.00 each with the exception of the one, Mrs. Barton, who is a mother with six children she is raising, and in the interest of hu-

manity I chose to cut that one down to $100.00. The others were all $200.00. And, the fines were paid.

Notwithstanding all of that, the teachers continued to violate the terms of my injunction, of my order, and on January 3rd, by stipulation and order, there were restrictions agreed upon with respect to the picketing involved.

In very broad general terms it provided that the ingress and egress to the buildings shall not be interfered with and that there shall be no violence. Picketing activities shall remain peaceful. It also provided that nothing in this order shall be construed to prevent, impair or effect any person's right to express or communicate their views or opinions on any matters relating to the condition or compensation of employment.

For several days during the hearings I had the entire school board seated here. And, I made exhaustive efforts, even by way of a court order, in chambers conferences, suggestions, to solve this situation, but I finally found that my efforts were futile and I was unable to resolve it in a peaceful, amicable way. At one point there was a feeling that maybe a change of the negotiating team personnel might assist and by agreement of Counsel, the suggestion emanting from them, that was done.

Now, I am constrained to say on the one hand that no appeal was ever taken from those Orders of October 8th and October 22nd of 1974 by either side. And, notwithstanding my finding of contempt there was a continuing violation of the orders of this Court.

Now, there is an old maxim well known to the law, "He who seeks equity must do equity." And, he who seeks the Court of Equity, and we do sit as a Court of Equity, must do so with what we call clean hands.

Now, on the other hand, the School Board didn't seek a change, didn't seek a modification of my order ordering the teachers back to work. But, rather than that they, on the other hand, did nothing until December 27th when they discharged them.

I feel that both sides have been in error on this score. And, I have said on prior occasions that this case has wore upon me personally very heavily. The fact is that both sides actually violated the terms of the order. The school board did not ask for a modification of my orders of October 8th or the 22nd, 1974, nor did the teachers.

Now, I find myself confronted with this and I shall put it as simply as I can. Is there a conflict between the Teachers Tenure Act and what is known as PERA?

In my judgment there is no conflict. In my judgment they stand side by side. And, I shall rely in my opinion to a large degree upon section 423.206, section 6, commonly known as PERA, Public Employment Relations Act. And, the language of that section is clear. We must parenthetically bear in mind the Tenure Act was passed back in 1937. This Act, PERA, as we call it, was passed in 1965.

The language of that section, section 6, 432.206 of the Compiled Laws is clear to me. The opening sentence says:

> "Notwithstanding the provisions of any other law, any person holding such a position who, by concerted action with others, and without lawful approval of his superior, wilfully absents himself from his position, or abstains in whole or in part from the full, faithful and proper performance of his duties for the purpose of inducing, influencing or coercing a change in the condition of compensation or the rights, privileges,

or obligations of employment shall be deemed to be on strike but the person, upon request, shall be entitled to a determination as to whether he did violate the provisions of this act."

Being the so-called thou shalt not strike provisions as it applies to public employees. And it is not disputed that teachers are public employees.

Going on reading from the statute:

"The request—but the person upon request shall be entitled to a determination as to whether he did violate the provisions of this act. The request shall be filed in writing with the officer or body having power to remove or discipliie such employee, within 10 days after regular compensation of such employee has ceased or other discipline has been imposed. In the event of such a request the officer or body shall within 10 days commence a proceeding for the determination of whether the provisions of this act have been violated by the public employee, in accordance with the law and regulations appropriate to a proceeding to remove the public employee. The proceedings shall be undertaken without unnecessary delay. The decision of the proceedings shall be made within 10 days. If the employee involved is held to have violated the law and his employment terminated or other discipline imposed, he shall have the right to review to the circuit court having jurisdiction of the parties, within 30 days from such decision, for determination whether such decision is supported by competent, material and substantial evidence on the whole record."

Now, yesterday, Mr. Homeier pointed out that two teachers had made application under this section, and it was

not disputed and I believe he said they were reinstated after a hearing.

And, then I have before me this letter marked Exhibit 1, written by Mr. Ellmann, directed to Mr. Frank Skopczynski, Crestwood School District, Board of Education, 1501 N. Beech Daly Road, Dearborn Heights, Michigan.

"Dear Mr. Skopczyiski:

In behalf of those teachers enumerated in the resolution of December 30, 1974, demand is hereby made pursuant to the Public Employment Relations Act for a separate hearing for each individual, and in accord with constitutional standards before a fair and impartial tribunal."

Paragraph two says:

"This demand is not to be construed to recognize the validity of any action of the Board or to waive any rights of any teacher pursuant to the Public Employment Relations Act the Tenure of Teachers Act, or any other rights which they may have either individually or collectively."

By the first paragraph learned Counsel tacitly recognizes the procedures under section 423.206 even though in his last paragraph he seeks to reserve or he seeks to have the letter not to be construed as a waiver of any rights that they may have, the teachers may have, under the Tenure Act, or any other rights that they may have either individually or not.

We were told yesterday, and correct me if I am in error, that the school board intends to recognize this request and demand, and I think we were told that quite openly on this record.

Now, this question arises, is there a conflict between the Teachers Tenure Act and PERA, the section which I just read? I am of the opinion that there is no such conflict.

In my judgment the Tenure Act passed way back in '37 did not contemplate strikes or PERA, which was passed in '65 which prohibited strikes.

I should go so far as to say there is an absence of conflict—or there is no conflict between PERA and the Tenure Act, because striking teachers in violation of PERA had no rights. Back when the Tenure Act was passed the Legislature did not anticipate the adoption of PERA.

I want to emphasize the opening sentence in section 423.206, section six, which reads: "Notwithstanding the provisions of any other law. . . ." and that act was adopted in '65 many years after the Tenure Act became operative.

PERA applies to strikes. My memory serves me well, there is an absence of any such provision in the Tenure Act per se. And, in brief the striking teacher is covered by PERA, the section I just read, rather than the Tenure Act.

In my view the Tenure Act outlines the procedures clearly. It does not cover the striking teacher. It was not within the mind of the legislature when they adopted the Tenure Act some—and some several years later PERA prohibiting strikes by public employees would become the law of this State.

I do not choose to make any reference to article five of the Tenure Act and article five known as 38.111 of the Compiled Laws was referred to by Judge Levin in his opinion and that act provides that:

> "No teacher on continuing tenure shall discontinue his service with any controlling board except by mutual consent, without giving written notice to said controlling board at least 60 days before September first of the ensuing school year."

And, then the final sentence:

> "Any teacher discontinuing his services in any other manner than as provided in this section shall forfeit his rights to continuing tenure previously acquired under this act."

Now, I choose to make no further reference to it, because Judge Levin in his very scholarly opinion chose to point out that as to that issue as to whether or not article five, section one does not apply to discontinuance of service as a result of the strike where there is no contract, says Judge Levin, "that among other things we defer to another time deciding whether article five, section one applies to discontinuance of service as a result of a strike." I cannot and I will not do what the learned Judge Levin stated he would not do. I will not pass upon it. I merely state it here, because the very able Supreme Court Judge says we will—or we defer to another time, so I too accepting his wisdom, his scholarly intellect, feel that should be deferred to another time, but it is a matter of statutory provision in the law.

Indeed, this is a very difficult situation and the difficulty arises because I said unequivocally that both sides did not obey my orders. The teachers continued to abstain from work. The school board did not ask for a modification of the order when they discharged them. To use the homely expression of the street, both sides are in a difficult position.

I want to point out to you before I make just two or three more observations—I read with care last night the opinion of the Michigan Supreme Court in 385 Michigan on page 710, opinion written by Mr. Justice Brennan, concurred in by Mr. Justice Black, *Judges of the 74th Judicial District versus Bay County.*

I do not think it necessary to belabor this opinion of the factual situation that occurred with respect to Judges versus Bay County but I utilize this case to emphasize a deep-seated philosophy in our jurisprudence. And, I quote from the opinion in part, on page 727,

> "An appreciation of the theory of administrative law dictates that courts move very cautiously when called upon to interfere with the assumption of jurisdiction by an administrative agency."

Then, he goes on, on page 728, saying:

> "Matters consigned to administrative determination are often technical in nature, and closely related to the carrying out of some statutorily defined public policy."

And, says the Supreme Court, speaking through Mr. Justice Brennan:

> "Judicial restraint tends to permit the fullest utilization of the technical fact-finding expertise of the administrative agency and permits the fullest expression of the policy of the statute, while minimizing the burden on Court resources.
>
> From these general considerations, emanates the doctrine of exhaustion, by which the courts have declined to act in contravention of administrative agencies where the remedies available through administrative channels have not been pursued to completion."

Now, let me engage in a bit of dissertation, if I may, with all due deference to my very learned and able colleagues.

The sad, indeed, crucial, critically crucial problem presented here goes to a basic fundamental and that fundamental concept rests thusly. To restore these teachers in the classroom in my judgment may conceivably destroy the respect that the student may have for the teacher. And, once you destroy the respect that a student has for a teacher, you destroy the respect that student has for all lawful authority, parental as well as judicial, if you will.

It is hard for me to believe that these students are not aware that the teachers contrary to the law abstained themselves and refused to work even in the face of a finding of contempt. This Court following the philosophy of Judge Brennan, where there are procedures where these matters can be handled, that is where they belong rather than to sow the seeds of decay which may happen if the relief sought by this order to show cause is granted.

I am constrained to add a personal note. Indeed, I am sympathetic to the teachers. I have two full time teachers in my own family, one part time, but I am also sympathetic to the children who were deprived of education, because of violation of the law, having been found guilty of contempt and continuing to defy.

And, the School Board too didn't ask, as I said before, for modification of the order when they fired them on the 27th. I think that is the date.

Is that the date? December 27th?

Mr. Homeier: Your Honor, the Board action was taken on December 30th, the termination was effective on the 27th.

Judge Rashid: Actually, it was December 30th, thank you.

Now, I am sympathetic to the parents. And, I am sympathetic to these children. I would say the problem was created in a large degree in a large measure by both sides.

I do not intend to belabor this opinion any further than to say in conclusion that there is no conflict between PERA and the Tenure Act.

Secondly, I would apply the maxims of equity which I already applied.

Thirdly, I would say that while I am sympathetic to all parties concerned I am most concerned about these children.

The Legislature has not seen fit up to this point to dedicate itself with dispatch to a change in the law, rather, the situation is now where it is—an attempt is made to place it in the hands of the Courts and I am subscribing to Judge Brennan's opinion philosophically in Judges versus Bay County.

I vote to deny the relief sought by the Plaintiffs in this order to show cause and very well recognizing that under PERA section six which I have quoted several times, 320.-11, there is a procedure which I am told by Counsel—or we are told by Counsel from the School Board will be respected, and on two occasions it already has been respected, and even Mr. Ellmann's letter will be respected. The procedure is there under PERA.

Let it be said in conclusion, while we wear judicial robes, I am constrained to paraphrase the words of an old Roman Philosopher, "I am a man, everything human is dear to me."

I shall conclude with that observation and yield to my distinguished brother.

Judge Bowles: Judge Rashid, Judge Roumell, some incidental and irrelevant preliminaries. The attractive young lady at my left, to your right, is not a witness in this case. She is my confidential secretary, Nancy Lewers, and she is taking down everything I say. I work happily with her and what I see recorded by her and by the very able Official Court Reporter will be my comments and the Majority's ruling in this cause and I will have no other comment.

I might say in terms of personal allusion that my assignment to this case occurred under the order of our Presiding Judge, Joseph A. Sullivan, about 4:00 o'clock, it was two days ago, I think, and I have devoted myself together with my distinguished colleagues to a careful examination of matters of law.

Judge Rashid and I have a long and most cordial professional and personal association having been appointed on the same day by the same Governor and having sat on this Honorable Court now into the 19th year.

We agree on almost everything. I think the only thing, Judge Rashid, you never quite accepted is that I am a Scotch Presbyterian.

Judge Rashid: I accepted it, and I tried to convert you without success.

Judge Bowles: All right. Let us then turn to the issues at hand. Let it be said for the Majority at the outset

that the Majority concurs in Judge Rashid's holding that both parties in this case are in open, flagrant defiance and in violation of his orders. The Majority of this Honorable Court deplores such violation. The Majority I am sure all of us, deplore present resort to any unlawful strikes termed sympathy strikes that are in clear violation of collective bargaining contracts between the parties involved not in this dispute and, indeed, in situations where there is no pending labor dispute between the particular Association and Employer Unit.

And, we find most regrettable so called pressure tactics calculated to induce or encourage a favorable result one way or another by any person before this Honorable Court.

Indeed, this conduct manifests, regrettably, a singular and a cynical lack of understanding of how Judges make their decisions and how courts function.

Now, this panel did not choose this case. Nor, did we choose the factual or legal context in which this case found its way to us. But, nevertheless, it is incumbent upon us to address ourselves dispassionately to the issues raised and make a decision without fear or favor to any party and oblivious and impervious to any public clamor.

The Judicial Department of Government of the United States of America has unique historic role. I might say all of us have been recently the beneficiary of a gift of a great book, a gift of the Detroit Bar Association, which is always interested as Lawyers in the continuing education of Judges. This is a book on the life of John Marshall. I read it over the holidays to my historical betterment.

And, that great jurist in establishing the role of the judiciary in this country put it very tersely:

> "It is emphatically the province and the duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity explain and interpret that rule and if two laws conflict with each other the Courts must decide on the operation of each."

That expression of then Chief Justice Marshall became the touch-tone of our judicial system and has contributed immeasurably to the growth of this country under a system of ordered liberty. Where the rule of law obtains not the rule of men and women but the rule of law.

So, we would say, the Majority would, with Judge Rashid, if this was merely viewed as a kind of another labor dispute, the Mayority would with him leave the parties where they were, with a plague on both your houses comment, which I recall was presicely what the late President Roosevelt did in the forties during the coal strike.

But, there are large monumental issues here, community issues, and as Judge Rashid has pointed out, the welfare of the students of this school district, the well being, indeed, the survival of this school system.

Indeed, we would hope that the Governor and the Legislature in considering new legislation which is so desparately needed would declare as preeminent the best interests of student and the educational system.

You know, the analogy to custody disputes is not too inept. We are under statutory rule. We now recognize as Judges the best interest of the children whether the parents are pleased or not.

I might say, historically, the Courts have not desired the role of intervention in labor disputes. The equity injun-

tion is an ill-appropriate method to settle labor disputes and in the private sector we learned that over 40 years ago but we have learned it yet in this type of dispute.

And, like Judge Rashid, and I am sure Judge Roumeil joins me, we are in this and other cases reaping the wild whirdwind of a very inadequate law as pertaining to such disputes.

Judge Rashid is quite correct in pointing out that this decision necessarily involves a careful examination of PERA and of the Tenure Act and a decision as to whether there is some rule of uniformity here that we might apply so that we could give full strength to the legislative enactments in both cases.

Let me say at the outset that we hold that the subject teachers are still employees under the terms both of PERA and the Tenure Act. It follows that the Association here remain the exclusive agent for purposes of collective bargaining on behalf of all teachers in the appropriate bargaining unit in all matters.

Now, our first basic holding is that the Tenure Act in its procedural specifications and requirements is controlling.

Let us turn, and I shall try to make this brief, I do not intend it to be an opinion that is enshrined in law libraries.

In *Rehberg* versus *Ecorse School District No. 11,* back in 1951, 330 Michigan, at page 547, it is stated:

> "The tenure act was enacted for the purpose of protecting teachers from being discharged or demoted from a continuing tenure except for reasonable and just cause and only after written charges have been

> filed and furnished the teacher, with notice of date and hearing."

And, at late as 1972, in *Smigel, SMIGEL, versus Southgate School District,* the panel of the Court of Appeals, excuse me, the Supreme Court of Michigan, at 388 Michigan, at page 563, had occasion to quote that same rule.

So, the Tenure Act, clearly it is intended to provide adequate and competent teaching staffs free from political and personal arbitrary interference.

It is intended to promote good order and the welfare of the State by preventing removal of capable experienced teachers at the personal whims of changing office holders.

It is intended to protect State Education by retaining in positions teachers who are qualified and capable and who demonstrate their fitness and to prevent dismissal of such teachers without just cause.

So, the Tenure Act is not just an act calculated to ensure the rights of the teachers as important as that is. It is intended also to serve the interest of the general public and ultimately the interests of students in providing a good educational system for their nurture.

Now, we have to necessarily in my judgement and in the judgment of Judge Roumell reach the conclusion that the Tenure Act and its procedural specification requirements are operative in this case. And, we think this conclusion is supported first by general theory of the law and philosophy.

The Tenure Act is a special act applicable obviously to teachers only. PERA is a general statute.

Now, I find nothing particularly damaging to the Majority's position on the chronology here. Yes, the Tenure Act,

1937; PERA, 1956, so the Legislature at that time had full opportunity if it saw fit to take a close look at the interrelationships of the subject act. But, the general rule, and I quote *Winter versus Royal Oak City Manager,* found in 317 Michigan 259, at page 265:

"Where there are two acts or provisions, one of which is special and particular (The Tenure Act) and certainly includes the matter in question, and the other general, which, if standing alone, would include the same matter and thus conflict with the special act or provision, the special must be taken as . . . an exception to the general act or provision . . ."

So it is here.

Now, we ran down the cases and found Michigan Compiled Laws Annotated under section 83, and there are many cases declatory and expressive of this rule and I only refer in generality then to that reference in support of our position.

So, let's put it this way, if the Legislature, in 1965, had wished to repeal and modify the procedure requirements of the Tenure Act, they easily could have done so through clear unmistableable language.

Let us look to that language that my learned brother has quoted.

Judge Rashid: Here—have you got it?
Judge Bowles: I like my book.
It says the same thing.

> "Notwithstanding the provisions of any other law, any person holding such position who, by concerted action with others, and without the lawful approval of his superior, willfully absents himself from his position . . ."

And, thereafter follows the procedure, "Notwithstanding the provisions of any other law."

Ladies and gentlemen, Legislatures and Legislative Draftsmen not like lawyers or judges are not at a loss for words. If they wanted by appropriate language to change the Tenuer Act, they certainly could have chosen such language.

And, we would say on behalf of the Majority here, if a change is desirable, and we don't decide that policy question, then that change should be addressed to the Legislature, the competent department or branch of government for such things.

The next question is did the teachers resign under the Tenure Act. We shall advert to that specifically under resignation leave of absence, section one.

> "No teacher on continuing tenure shall discontinue his services with any controlling Board except by mutual consent, without giving a written notice to said controlling Board at least 60 days before September first of the ensuing school year. Any teacher discontinuing his services in any other manner than as provided in this section shall forfeit his rights to continuing tenure previously acquired under this act."

We must read this with particular reference to the language, "at least 60 days before September first of the ensuing school year," and the cases, and I think quite reasonably so, have interpreted that to mean that a school board should not be placed in the position of having at the last to hunt a teacher, hence, the 60 day notice requirement.

Parenthetically, Judge, Judges, my father was the Secretary of a Board of Education many years in Northwestern Pennsylvania and how I recall the scurrying about the

week before opening of school when somebody had gotten a better job and had gone some place else.

Now, that is the meaning in our judgment of the language. That is the purpose of the language, to require teachers to play fair with their boards and give such requisite notice, at least 60 days before September first of the ensuing year.

Now, did the teachers resign here? Has anyone shown me anything that they have said or done to indicate that they quit? I got the distinct impression they want to go back, at least sometime, maybe on their own terms, but I don't see anythting in this record to indicate any resignation. Or, you could say, perhaps, by operation of law this is a constructive resignation. Well, certainly for this Court to engraft upon this statue such a construction would be a torture. We cannot read into that which does not appear on the face of the statute.

Now, I allude only in passing, because Counsel are most sophisticated and have been extremely helpful, but all of us know and I take judicial notice of the procedural requirements of the tenure act, which are clear and implicit beyond any peradventure. I advert particularly to article four section one, discharge or demotion of a teacher on continuing tenure. The requirement under section two of written charges:

> "All charges shall be made in writing, signed by the person making the same and filed with the secretary, clerk or other designed officer . . ." so forth and so on.
>
> There is a provision that, "On the filing of charges . . . a controlling board may suspend the accused teacher from active performance of duty until a decision is rendered . . . the teacher's salary shall continue . . ."

There is a provision setting up in section four the very precise and minute procedural standards of such hearing. I only advert to them in passing.

Now, could it be said though that those requirements only apply in a kind of routine case, you know, unattended with any labor dispute overtones or any other factors? I have found no authority in any Michigan Supreme Court decision or any Court of Appeals decision in this State which does otherwise than require precise punctilious compliance with the procedural requisites of the Tenure Act.

Let me give you just two cases by way of illustration. *Wright versus Port Huron Area School District,* this is Court of Appeals 13, Michigan App., at page 1. This is an interesting case, as all cases are, you know. I think it is expressive of the general philosophy. Its unanimous panel —I might say the opinion is written by Presiding Judge Thomas Giles Kavanagh, who this week beame the Chief Justice of the Michigan Supreme Court. There was a claim here that the subject teacher no longer had enforceable rights. He addressed a letter to the school district stating he was under continuing tenure in the district. He requested assignment to a teaching position. That request was denied. He went to the tenure commission which reviewed the facts and deterimined that he had resigned his position as a teacher by mutal consent.

Then, it went to the St. Clair County Circuit Court on a question of construction of back pay provisions but the language here is very interesting.

> "Contrary to the clear language of this statute, in October, 1962 when the teacher was notified by

letter of the suspension, no charges were made nor was a copy of charges furnished, nor was his salary continued . . . nor was he afforded the opportunity of a hearing . . . The procedures set forth by statute were ignored by the School District. Except for a letter of October 12, 1962, notifying plaintiff of his suspension and another letter of October 24, 1962, indicating the final salary the district considered to be due, he was not advised of his status."

Now, the Court said this, "either the Act applies or it does not. Either he was discharged in October, 1962, when his pay was stopped and he last taught, or he was not discharged and his pay should not have been stopped. The act is meant to protect teachers who hold continuing tenure from being discharged except for reasonable just cause and only after written charges have been filed and furnished by the teacher. We cannot excuse the failure to follow the statute on the grounds that it would have been a difficult matter or contrary to the public policy for the school board, upon hearing of the criminal charges against plaintiff", accused of a felony, "to file written charges and hold a hearing."

Here is a teacher who was accused of a felony.

"Only upon such a hearing could the decision of the controlling board to terminate the teacher's employment and to discontinue his pay provide the teacher with those administrative remedies to which he was entitled."

So, it was held he was not effectively discharged in that case. Now, there is a case where the teacher is accused of a felony, so, still punctilious requirement of observance of the teure act due process provisions.

I advert now to *Rumph, R U M P H, versus Wayne Community School District.* It is found at 31 Michigan App., 542, excuse me, 545, at page 561. It involved a sabbatical leave controversy and I don't need to detail all of it but this is just a fight over what happened on a sabbatical leave situation. Here is what the Court said:

"Under Article Five, the above-cited statute provides that a teacher who discontinues his services without either mutual consent or a notice to the board 60 days before the school year, shall forfeit his rights to continuing tenure previously acquired. This section of the tenure act is clearly designed to prevent teachers from departing a school district immediately before school commences and thus leaving the school board without a sufficient number of teachers, or time to replace them," as we mentioned before.

Then, finally, this comment on 562:

"Discharge of a tenure teacher can be accomplished ony by strict compliance with the procedural safeguards."

And, this comment is apt:

"We find it to be contrary to the legislative intent, as expressed in the tenure act, to permit school boards to summarily dismiss tenure teachers and then have the Tenure Commission, after the fact, find that the teacher discontinued his services. Such a procedural approach places the burden upon the tenure teacher to persuade the commission that he should not have been dismissed, rather than the present statutory approach which places the burden upon those making charges against the tenure teacher."

I submit, rather clear and explicit language.

Now, Counsel for the Association has also made an argument on due process grounds, namely, the growing number of cases both in the Federal and State Courts which recognize procedural due process requirement of a hearing bebefore the loss of a protected interest, be it property or liberty. It has been applied in replevin as you know, revocation of a driver license, some public school teachers, garnishment, labeling somebody an excessive drinker; revocation of a driver license, some public school teachers, policemen, in one case I happen to have personal knowledge of.

We hold for the Majority that we do not have to get to the constitutional question here. We feel very comfortable with our holding that the procedure requirements of the Tenure Act are controlling on the facts of this case.

But, we do recognize a growing trend in both Federal and State law to recognize that before a protected interest, be it liberty or property, is divested, before, there should be a hearing before an impartial tribunal.

We found interesting an opinion of the Honorable Noel P. Fox, Federal District Judge, in the Western District, sitting in Grand Rapids. Parenthetically Judge Fox is well known to this entire panel. And, I had the pleasure many years ago, many more than I would like to admit, of sitting with him under then Labor Mediation Board. He has been a Federal Judge these many years.

He had a case, *Lake Michigan College Federation of Teachers and Edward Shaffer versus Lake Michigan Community College*. And, he reviewed the law and he came to this conclusion as far as the expression of principle.

> "Where the State seeks to deprive a person of a protected liberty or property interest it must provide that person with an opportunity to be heard at a meaningful time and in an meaningful manner." End of quote.

Now, in fairness this case is on appeal. We don't know what is going to happen to it but it is a careful and I think rather illuminating exposition of the law.

But, let it be made clear, we are not holding the section six requirements of PERA unconstitutional. Using the rule of judicial restraint we do not rule on that constitutional issue on which we do not need to rule.

We need not belabor that the denial of the Court's injunctive writ in this case would result in irreparable damage, factually and legally, to the students, to the school sysem, to the community at large and we so hold.

So, this is what we specifically hold so far as the grant of mandatory affirmative relief.

We will enter an order revoking and cancelling the discharge notices.

We will enter an order ordering the Board of Education to reinstate all discharged teachers.

We will enter an order requiring the Board to take all necessary steps to effect a full resumption of educational activities, on Monday, January 13th, 1975.

We will enter an order granting mandatory affirmative relief ordering the Education Association, its Officers, its Agents and Members to take all necessary steps to effect a return to work, on Monday, January 13th.

Now, those order requirements stand unqualified, when we sign it. And, what I say now will not diminish them one

way. And, the order part that I have just given you is not qualified with what I say now.

As to the resolution of contract issues we recommend and strongly urge that the parties submit all remaining issues to final and binding arbitration.

Both have a responsibility to this community and to this Court to provide their own mechanism, that is set up a mutual agreeable board of arbitration for the disposition of all remaining issues. And, if they have a will to do so, I am sure that their very able Counsel can put together such an effective instrumentality.

And, I might say that this Honorable Court has already made a contact with Hyman Parker, the Director of the Michigan Employment Relations Board, who I might say I appointed a number of years ago, to lend his assistance in drafting such a submission to arbitration.

Further, in the event that the parties themselves have not worked out the mechanics of the establishment of a board of arbitration, the Court reserving its jurisdiction, will itself use its good offices in accomplishing this end.

And, the deadline for constituting the board of arbitration, again, is — we want it constituted by Monday, January 13th, at 9:00 o'clock.

We will ask Mr. Ellmann to prepare an appropriate injunctive order and to present it to opposing Counsel and to the Court for entry promptly.

Now, this last comment. . . .

Judge Rashid: Go ahead, finish.

Judge Bowles: I made the contact with Hyman Parker, that is correct.

Judge Rashid: I did not.

Judge Bowles: That is correct.

Now, in summation, and perhaps, a superfluous comment, this is a dispute where there are no winners in a sense, but the educational system and the students have been the innocent losers. Neither party here can allow its pride of position or its hostilities to stand in the way of a full resumption of all educational activities in this District and a complete and final resolution of all contract issues.

You know, law and liberty go together and many times injunstice and violence are partners. This comment from Leonard Baker in his great biography of John Marshal, "Judicial reason is a substitute for the battlefield to determine the correctness of actions of persons in groups in our society."

And, I shoud hope on behalf of this Court that at long last in this case the rule of law and reason would prevail.

Thank you.

Judge Roumell.

Judge Rashid: Judge Roumell.

Judge Roumell: Let the record show that I concur in the opinion delivered by Judge Bowles.

Judge Rashid: Let the record — excuse me, are you through?

Judge Roumell: Yes.

Judge Rashid: Let the record show that I dissent.

A Spectator: And, so do we.

Judge Rashid: Let there be no outeries or disturbances whatsoever.

I was pleased to here Judge Bowles indicate—when he said this Honorable Court contacted Hyman Parker—I was pleased that he corrected that, because as one who has lived with this case, I have not or did not contact him or talk with him.

Now, just one minute, please.

The panel is of the opinion that in the best interest of all concerned that the members of the Panel will make no public statements or utterances of any kind with respect to these respective decisions.

It is clear on the record that it is a two to one finding and the statements of Judge Bowles and his determination is concurred in by Judge Roumell who represent the majority, and it is a two to one decision, and that is the way it stands.

Judge Bowles: I concur with you on that ruling.
Judge Roumell: I concur.
Judge Rashid: All right.
(Whereupon, this hearing was concluded at 10:25 o'clock a.m.)

APPENDIX B

OPINION OF THE COURT OF APPEALS

(State of Michigan—Court of Appeals—Division 1)

(Filed January 17, 1975)

Before: V. J. Brennan, P.J., Bashara and M. J. Kelly, JJ.
Per Curiam

This is an appeal from the decision of a three-judge panel of the Wayne County Circuit Court. The panel held, by a 2 to 1 decision, that some 184 teachers had been improperly fired by the Board of Education of the Crestwood School District. The panel ordered that the teachers be reinstated. We granted the Board an emergency appeal and issued an order staying the relief granted in Circuit Court. Because of the compelling importance of this case,

we ordered accelerated filing of briefs and early disposition of the cause. In spite of the obvious time limitations, we have been favored with incisive briefs by the parties and the amici curiae.

The parties have been without a collective bargaining agreement since August of 1973. Between that time and this, negotiations have proved futile.

September 3, 1974, was the date on which the schools in the district were to reopen following the summer vacation. The teachers, members of the Crestwood Educational Association (CEA), refused to report for work. The situation thus remained in limbo until September 30, 1974, when plaintiffs initiated an action in Wayne County Circuit Court. They sued as homeowners and taxpayers in the district and as the parents of school children in the district. Their complaint requested that the Board and teachers be ordered to bargain in good faith. It was also requested that the teachers be ordered to return to work and that the Board be enjoined from firing the teachers.

By stiplation of all concerned, the Rockwells were dismissed as parties plaintiff. The litigation continued, however, on the cross-complaint of the Board. On October 8, 1974, Wayne County Circuit Judge Joseph G. Rashid ordered that the teachers return to work and that the Board implement the terms of its proposed salary schedule. Specific orders designed to require intensive and serious negotiating were also entered. The terms of these orders were apparently respected and were supplemented by a further injunction against striking issued by Judge Rashid on October 22, 1974.

On December 4, 1974, the teachers again refused to report for work. Contempt proceedings followed, resulting in fines against certain teachers which were paid. Sixteen

days later, the Board adopted a resolution requiring the teachers to either report to their regular teaching assignments on Friday, December 27, 1974, or to submit a letter of resignation by 4:30 p.m. on December 27. It was further resolved that any teachers failing to exercise the option would have their employment terminated as of 11:59 p.m. on December 27, 1974. Copies of the resolution were served on the teachers.

Of the 222 teachers in the district, 38 reported for work. None submitted a letter of resignation. The remaining 184 teachers were, by Board resolution of December 30, 1974, deemed to have terminated their employment. Substitute teachers were hired by the Board on a day-to-day basis, however the Board conceded at oral argument that as of this date the classes are not fully-staffed on a full-time basis.

The teachers, through the CEA, responded by filing with the Michigan Employment Relations Commission (MERC) a charge that the Board had failed to collectively bargain in good faith and had attempted by its actions to destroy and interfere with the CEA in violation of §§ 7 and 10 of the Public Employment Relations Act (PERA), formerly known as the Hutchinson Act, MCLA 423.201, *et seq;* MSA 17.455(1) *et seq.* This charge followed a previous CEA charge against the Board. Both charges are presently pending before MERC and are not directly involved in the case before us.

The teachers also responded to the December 30 resolution by a letter to the Board dated January 6, 1975, wherein the teachers requested individual hearings before the Board in accord with §6 of PERA, MCLA 423.306; MSA 17.455(6). It was specified in the letter that the request for a hearing was not to be construed as a waiver of any

other employee rights. On January 6, 1975, the CEA moved in Circuit Court for an injunction to prevent the Board from relying on the December 30 resolution and to prevent the Board from terminating any teacher in a manner other than that set out in the Teachers' Tenure Act, MCLA 38.71 *et seq;* MSA 15.1971 *et seq.*

The presiding judge of the Wayne County Circuit Court appointed a three-judge panel consisting of Judge Rashid, Judge Thomas Roumell and Judge George Bowles to hear the motion. Judges Bowles and Roumell decided that the provisions of the Teachers' Tenure Act controlled and that the purported firings were of no effect because of noncompliance with the Teachers' Tenure Act. Judge Rashid filed a cogent, persuasive dissent finding that PERA controlled and that the teachers were discharged in compliance with that Act. It is from the order granting CEA's motion for an injunction that the Board appeals.

It is well settled that there is neither a common law nor a constitutional right of public employees to strike. *City of Detroit v Division 26, AASER,* 332 Mich 237; 51 NW2d 228 (1952). Moreover, in this State, public employees are specifically denied the power to strike by §2 of the Public Employment Relations Act.

That Act defines a public employee as, among others, a "person in the public school service." MCLA 423.202; MSA 17.455 (2). It is undisputed that these teachers are public employees subject to the provisions of the Act.

Section 1 of the Act defines a "strike" as:

> "Strike means the concerted failure to report for duty, the wilful absence from one's position, the stoppage of work, or the abstinence in whole or in part from the full, faithful, and proper performance of the

duties of employment, for the purpose of inducing, influencing, or coercing a change in the conditions, or compensation, or the rights, privileges, or obligations of employment." MCLA 4223,2201; MSA 17.455 (1).

The circuit court panel found, and we agree, that the teachers were engaged in a strike prohibited by the Act and thus, we believe, became subject to the provisions of §6 of PERA.

By necessary inference that section gives public employers the power to discipline or remove employees who engage in a strike. It refers to "the officer or body having the power to remove or discipline such employee," and refers to cessation of compensation or imposition of other discipline. Furthermore, §6 says, "If the employee involved is held to have violated this law and his employment terminated * * *." MCLA 423.2206; MSA 17.455(6). As originally enacted, PERA provided for automatic termination of employment. 1947 PA 335, §4. While that provision was repealed by 1965 PA 379, we do not believe it in any way detracted from the Board's authority in this area. We believe it simply made the discipline of a striking employee discretionary with the employer under §6.

Our central concern on this appeal, once having determined that the PERA grants the Board the authority to discharge a striking teacher is to determine the manner in which disciplinary action may be taken. In performing our duty in this regard we are guided by what our Supreme Court said in *Wayne County Civil Service Commission v Board of Supervisors,* 384 Mich 363, 373; 184 NW2d 201 (1971),

> "This is not to say that the act of 1965 repeals outright the act of 1941. Respecting as always our long

since declared and regularly maintained rule that repeals by implication are not favored, and that it is only when the two measures in view are so incompatible that both or all cannot fully stand, we can only find that this is a striking instance for application of that rule which, back in 1877, was written into the Court's opinion of *Breitung v Lindauer* (1877), 37 Mich 217, 233:

> "'The rule is that the latter act operates *to the extent of the repugnancy,* as a repeal of the first, or, if the two acts are not in express terms repugnant, yet if the latter *covers the whole subject of the first,* and contains new provisions showing that it was intended as a substitute, it will operate as a repeal.'" (Footnote Omitted)

The important point made in the above quotation is that the law does not favor repeals by implication. It is only where no reasonable construction of the statutes involved permits of reconciliation or allows the purpose of each to be served that a repeal by implication is properly found to have occurred. *Detroit Police Officers Association v City of Detroit,* 391 Mich 44; 214 NW2d 803 (1974).

In an attempt to perform our function in this regard, we have exhaustively considered the contentions of all parties regarding the proper interpretation of these two statutes. MCLA 423.206; MSA 17.455(6) provides:

> "Notwithstanding the provisions of any other law, any person holding such a position who, by concerted action with others, and without the lawful approval of his superior, wilfully absents himself from his position, or abstains in whole or in part from the full, faithful and proper performance of his duties for the purpose of inducing, influencing or coercing a change in the con-

ditions or compensation, or the rights, privileges or obligations or employment shall be deemed to be on strike but the person, upon request, shall be entitled to a determination as to whether he did violate the provisions of this act. The request shall be filled in writing, with the officer or body having power to remove or discipline such employee, within 10 days after regular compensation or such employee has ceased or other discipline has been imposed. In the event of such request the officer or body shall within 10 days commence a proceeding for the determination of whether the provisions of this act have been violated by the public employee, in accordance with the law and regulations appropriate to a proceeding to remove the public employee. The proceedings shall be undertaken without unnecessary delay. The decision of the proceeding shall be made within 10 days. If the employee involved is held to have violated this law and his employment terminated or other discipline imposed, he shall have the right of review to the circuit court having jurisdiction of the parties, within 30 days from such decision, for determination whether such decision is supported by competent, material and substantial evidence on the whole record."

In contrast the Teachers' Tenure Act provides, in pertinent part:

> "The controlling board, if it decides to proceed upon such charges, shall furnish the teacher with a written statement of the charges including a statement of the teacher's rights under this article, and shall at the option of the teacher, provide for a hearing to take place not less than 30 nor more than 45 days after the filing of such charges." MCLA 38.102; MSA 2002.

> "Any hearing held for the dismissal or demotion of a teacher, as provided in this act, must be concluded by a decision in writing, within fifteen [15] days after the termination of the hearing. A copy of such decision shall be furnished the teacher affected within five [5] days after the decision is rendered." MCLA 338.104 (f); MSA 15.2004 (f).
>
> "A teacher who has achieved tenure status may appeal any decision of a controlling board under this act within 30 days from the date of such decision, to a state tenure commission." MCLA 38.121; MSA 2021.

It is our considered opinion that irreconcilable repugnancies exist between these acts in only two respects:

(1) §6 reduces the time for hearing and decision to the 10 day provisions stated therein;

(2) §6 provides an alternative appellate route—to Circuit Court, rather than to the State Tenure Commission, as provided for in Article 6, §1 of the Tenure Act.

In these two respects, and these two respects only, the provision of §6 of the PERA prevail. The remainder of the provisions can be read as being consistent with one another.

Under §6 of PERA the school board has the power to determine whether a school teacher has engaged in the type of activity proscribed by the Act. Once the Board has made such a detemination, it is required to follow the procedures outlined in the Teachers' Tenure Act if the Board desires to discipline the teacher. In the event formal written charges are filed against the teacher and served upon him or her in conformance with MCLA 38.102; MSA 15.2002, the teacher shall have 10 days within to request a formal hearing. If such a hearing is requested, it shall be held in

accordance with the provisions of the Teachers' Tenure Act. After the Board reaches a determination upon such a hearing, the employee is entitled to review in accordance with the provisions of §6 of PERA.

The Board argues that teachers involved in a labor dispute have thereby discontinued their services within the meaning of Article V §1 of the Teachers' Tenure Act. This argument is without merit. In *Holland School District* v *Education Association,* 380 Mich 314; 157 NW2d 206 (1968), the teachers argued, *inter alia,* that since there was no contract they, as a matter of law, could not be employees and thus could not be subject to the injunctive powers of the court. The Supreme Court by remanding the case for further factual determinations on the issuance of an injunction necessarily concluded that the teachers were employees. The inference drawn from *Holland, supra,* and we so hold, is that teachers involved in a labor dispute have not discontinued their services. See 1970 OAG No. 4704, p 150.

The school board, by not following the procedures outlined above, discharged the striking school teachers in a procedurally improper manner. That being the case, it is clear the teachers are entitled to be reinstated. The case should not end here, however.

In the bitter, sanguinary struggle between these parties it is apparent that the orders of the trial judge were blatantly ignored. The purpose of the Tenure Act is to prohibit the arbitrary abuse of power and the teachers herein seek to interpose that Act to vindicate their own arbitrary abuse of the lower court orders. All three judges in the trial court agreed that both parties were in "open, flagrant defiance and in violation of [Judge Rashid's] orders." The court below observed that we are reaping the wild whirlwind of a very inadequate law as pertaining to such disputes." However, in light of the present confusion prevailing in this area, the lower court judges obviously felt restricted in fashioning an appropriate remedy to handle this all too familiar situation.

We must resist abuses of the judicial system wherein the parties seem to want to handle the power of the court like a spigot; turn it off when it doesn't suit their interests (ignore, violate, flaunt injunctive orders), turn it on when it appears to suit their interests (seek enforcement of a return to work order which has been standing in prominent violation).

The lower court here attempted in various ways to bring this dispute to a speedy conclusion so that both the teachers and the board could get back to their primary function —educating the children enrolled in their schools. Both sides to this dispute, through their intransigence, have demonstrated to the satisfaction of this Court that to simply order the reinstatement of the fired teachers would not adequately resolve any of the problems underlying this controversy. What is needed is the establishment of a procedure whereby these issue may be resolved so that the teachers, the board, the children and the community may begin the process of healing the wounds which have festered for so long. In pursuit of this end we hereby invoke the broad range of powers vested in this Court by GCR 1963, 820.1(7) and MCLA 600.310; MSA 27A.310 and order that the parties effect a full resumption of educational activities in the Crestwood School District by Monday, January 20, 1975, in conformance with the order of the Wayne County Circuit Court dated January 10, 1975, the stay of which is hereby dissolved.

The exigencies of this situation require us to order, under GCR 1963, 820.1(7) and MCLA 600.310, that within

10 days from the date of this opinion the lower court shall order compulsory arbitration to resolve the remaining issues which separate the parties. The number of the arbitrators, the method of their selection and the time limitations are left to the discretion of the trial court.

Affirmed as modified; remanded for proceedings consistent with this opinion.

No costs, a public question being involved.

APPENDIX C

OPINION OF THE SUPREME COURT OF MICHIGAN

(Decided April 4, 1975)

LEVIN, J. The issue is whether school teachers who strike may be discharged without a prior hearing.

Resolution requires construction of the public employment relations act (the PERA)[1] in relation to the teachers' tenure act[2] and consideration of the teachers' claim that the PERA is violative of the Due Process Clause unless construed to require a prior hearing.

Section 6 of the PERA provides that public employees who, in concerted action with others, in support of efforts to obtain a change in compensation or other conditions of employment, fail to render services shall be deemed on strike. If the employee is disciplined by his employer for striking, he is entitled, on request, to a determination

[1] MCLA 423.201 *et seq.*; MSA 17.455(1) *et seq.*

[2] MCLA 38.71 *et seq.*; MSA 15.1971 *et seq.*

whether he violated the provisions of the act. The request is to be made "within 10 days *after* regular compensation of such employee has ceased or other discipline has been imposed". (Emphasis added.) If the employee is found to have violated the act, he may seek review by the circuit court.[3]

In contrast, the teachers' tenure act requires a hearing *before* discharge. That act provides that a teacher on continuing tenure may be discharged or demoted "only for reasonable and just cause, and only *after* such charges,

[3] Notwithstanding the provisions of any other law, any person holding such a position who, by concerted action with others, and without the lawful approval of his superior, wilfully absents himself from his position, or abstains in whole or in part from the full, faithful and proper performance of his duties for the purpose of inducing, influencing or coercing a change in the conditions or compensation, or the rights, privileges or obligations of employment shall be deemed to be on strike but the person, upon request, shall be entitled to a determination as to whether he did violate the provisions of this act. The request shall be filed in writing, with the officer or body having power to remove or discipline such employee, within 10 days after regular compensation of such employee has ceased or other discipline has been imposed. In the event of such request the officer or body shall within 10 days commence a proceeding for the determination of whether the provisions of this act have been violated by the public employee, in accordance with the law and regulations appropriate to a proceeding to remove the public employee. The proceedings shall be undertaken without unnecessary delay. The decision of the proceeding shall be made within 10 days. If the employee involved is held to have violated this law and his employment terminated or other discipline imposed, he shall have the right of review to the circuit court having jurisdiction of the parties, within 30 days from such decision, for determination whether such decision is supported by competent, material and substantial evidence on the whole record." MCLA 423.206; MSA 17.455(6).

notice, hearing, and determination thereof".[4] (Emphasis supplied.)

The circuit court found that the failure of the school board to proceed in accordance with the teachers' tenure

[4] MCLA 38.101; MSA 15.2001.

The Union also relies on § 569 of the School Code of 1955 providing:

"Any board after a teacher has been employed at least 2 consecutive years by the board may enter into a continuing contract with such teacher if the teacher holds a permanent or life certificate. A continuing contract is a contract which shall remain in full force and effect, as provided in the rules and regulations of the board, until the teacher resigns, elects to retire, is retired, or is dismissed for reasonble and just cause after a fair hearing." MCLA 340.569; MSA 15.3569. The foregoing language, with minor style variations, was added by 1943 PA 96 to a compilation of school laws which preceded the adoption of the School Code of 1955.

The last clause of this 1943 enactment, "dismissed for reasonable and just cause after a fair hearing", parallels Art IV. § 1 of the earlier enacted teachers' tenure act (1937 PA [Ex Sess] 4) which provides that a teacher on continuing tenure may be discharged or demoted "only for reasonable and just cause, and * * * hearing * * *". MCLA 38.101; MSA 15.2001.

The teachers' tenure act provides that the teacher shall be provided with written charges and, at the option of the teacher, for a hearing on these charges "not less than 30 nor more than 45 days after the filing of such charges". MCLA 38.102; MSA 15.2002. Although the charging board may suspend the accused teacher from "active performance" pending resolution of the charge, it may not withhold pay or otherwise sever the employment relationship before the hearing MCLA 38.103; MSA 15.2003. A tenured teacher may appeal "any decision of the board and be provided a hearing before the State Tenure Commission. MCLA 38.121; MSA 15.2021. Either party may seek judicial review of the commission's decision.

act required reinstatement of the teachers who were discharged. The Court of Appeals affirmed.[5]

We conclude that a teacher, including a teacher on continuing tenure, who strikes in violation of the PERA may be disciplined without a prior hearing, and we reverse the circuit court and the Court of Appeals.

I

The Crestwood Education Association (the union) and the Board of Education of the School District of Crestwood (the school board) have been involved in a prolonged labor dispute. There has been no collective bargaining agreement since August, 1973.

When the school year commenced on September 3, 1974, the teachers, members of the union, did not report for work. This action was brought against the union and the school board on September 30, 1974, by the plaintiffs as homeowners, taxpayers and parents. By subsequent stipulation, the plaintiffs were dismissed and the litigation has continued on the cross-complaint of the school board.

Injunctive orders were issued in October and classes resumed. In December the teachers again did not report for work and classes were suspended. Contempt proceedings followed. Thereafter the school board adopted a resolution requiring the teachers either to report for work or to submit a letter of resignation by December 27, 1974, failing which their employment would be terminated. Thirty-eight teachers reported for work, one submitted a letter of resignation and the remaining 184 were, by school board resolution of December 30, 1974, deemed to have terminated their employment.

[5] 57 Mich App 636; — NW2d (1975).

The school board hired substitute teachers and attempted to operate the schools.

The union had therefore filed unfair labor practice charges with the Michigan Employment Relations Commission (MERC). The union then filed an amended charge complaining that the school board had not bargained in good faith and was attempting to destroy and interfere with the union. The teachers sought individual § 6 hearings on January 6, 1975. On January 10th the circuit court set aside the school board's resolution of December 30, 1974 and directed reinstatement of the teachers and the resumption of classes. The Court of Appeals affirmed. The teachers returned to work.

II

The PERA defines "strike",[6] prohibits strikes by public employees,[7] and interdicts any public employer from authorizing a strike.[8]

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[6] "As used in this act: (a) 'strike' means the concerted failure to report for duty, the wilful absence from one's position, the stoppage of work, or the abstinence in whole or in part from the full, faithful and proper performance of the duties of employment, for the purpose of inducing, influencing or coercing a change in the conditions, or compensation, or the rights, privileges or obligations of employment." MCLA 423.201; MSA 17.455(1).

[7] "No person holding a position by appointment or employment in the government of the state of Michigan, or in the government of any 1 or more of the political subdivisions thereof, or in the public school service, or in any public or special district, or in the service of any authority, commission, or board, or in any other branch of the public service, hereinafter called a 'public employee,' shall strike." MCLA 423.202; MSA 17.455(2).

[8] "No person exercising any authority, supervision or direction over any public employee shall have the power to authorize, approve or consent to a strike by public employees, and such person shall not authorize, approve or consent to such strike, nor shall any such person discharge or cause any public employee to be discharged or separated from his or her employment because of participation in the submission of a grievance in accordance with the provisions of section 7." MCLA 423.203; MSA 17.455(3).

Section 6 of the PERA empowers the officer or body generally having disciplinary authority over an employee to terminate the employment of or impose other discipline on an employee who strikes in violation of the PERA. In providing that an employee's request for a hearing to determine whether he did violate the PERA be filed within ten days *after* regular compensation has ceased or other discipline has been imposed, the Legislature manifested an intention that the officer or body may impose discipline without a prior hearing.

Section 6 begins with the words "[n]otwithstanding the provisions of any other law".

The Legislature, recognizing the diversity of legislation concerning public employees, provided in § 6 a specific, unitary procedure for the discipline of public employees who strike superseding the diverse procedures applicable to different public employees where the basis for discipline is a ground other than striking.

Section 6 further provides that the proceeding for the determination whether the public employee violated the provisions of the PERA shall be "appropriate" to a proceeding for the removal of the employee (fn 3), and, thus, in the case of a tenured teacher, consonant with the tenor of the procedures spelled out in the teachers' tenure act. But to the extent there is conflict—and manifestly there is conflict as the teachers' tenure act provides that discipline may be imposed only after charges, notice, hearing and determination, while the PERA contemplates imposition of discipline before a determination of whether the act has been violated and provides for a hearing only on request of the employee after the imposition of discipline—the PERA is to govern "[n]otwithstanding the provisions of any other law".

In enacting the PERA, the Legislature did not, apart from the "[n]otwithstanding the provisions of any other law" clause of § 6, specifically provide that the PERA supersedes or replaces existing laws which arguably also govern public employee labor relations. The union contends that the quoted clause modifies only the first sentence of §6.

This Court has consistently construed the PERA as the dominant law regulating public employee labor relations. In *Detroit Police Officers Association* v *Detroit*, 391 Mich 44; 214 NW2d 803 (1974), we held that residency and retirement benefits are mandatory subjects of collective bargaining under the PERA, although provisions of a city's ordinance and charter, promulgated under the home-rule act,[9] would otherwise govern. Earlier, in *Regents of the University of Michigan v Employment Relations Commission*, 389 Mich 96; 204 NW2d 218 (1973), this Court "harmonized" the constitutional authority of the Regents to supervise the university[10] and the authority of the Legislature to provide for the resolution of public employee disputes,[11] holding that interns and residents in the University of Michigan Hospital were entitled to engage in collective bargaining. In *Wayne County Civil Service Commission v Board of Supervisors*, 384 Mich 363, 374; 184 NW2d 201 (1971), this Court held that the original authority and duty of the Wayne County Civil Service Commission "was diminished" *pro tanto*" by the PERA "to the extent of free administration of the latter".

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[9] Const 1963, art 7, § 22; MCLA 117.1 *et seq.*; MSA 5.2071 *et seq.*

[10] Const 1963, art 8, § 5.

[11] Const 1963, art 4, § 48.

The analysis is the same whether we label this reconciliation repeal by expression or by implication, *pro tanto* diminishing or harmonizng. The supremacy of the provsions of the PERA is predicated on the Constitution (Const 1963, art 4, §48) and the apparent legislative intent that the PERA be the governing law for public employee labor relations.

The teachers' tenure act was not intended, either in contemplation or design, to cover labor disputes between school boards and their employees. The 1963 Legislature in enacting the teachers' tenure act could not have anticipated collective bargaining or meant to provide for the resolution of labor relations disputes in public employment. This Court's observation in *Wayne County Civil Service Commission, supra*, is pertinent: "In [no] instance could collective bargaining by public employees have been in the minds of the people, or of the [1973] legislators. The thought of strikes by public employees was unheard of. The right of collective bargaining, applicable at the time to private employment, was then in comparative infancy and portended no suggestion that it eventually might enter the realm of *public* employment." (Emphasis by the Court.)

The State Tenure Commission has no authority to entertain an unfair labor practice charge against a school board. Its jurisdiction and administrative expertise is limited to questions traditionally arising under the teachers' tenure act.

MERC alone has jurisdiction and administrative expertise to entertain and reconcile competing allegations of unfair labor practices and misconduct under the PERA.

There is no provision in the teachers' tenure act analogous to § 16(h) of the PERA (see Part VI, *infra*) provid-

ing for temporary relief by a circuit court pending consideration of an unfair labor practice charge. The circuit court's jurisdiction under the teachers' tenure act does not arise until appeal from a decision of the State Tenure Commission.

All teachers do not have rights of continuing tenure. Yet both tenured and non-tenured teachers are in a single public employee bargaining unit and have the same rights and obligations under Michigan's labor relations statutes.[12]

A construction of the statutes providing uniform treatment of all public employee labor relations questions is more likely to effect a sound and expeditious resolution of labor disputes. Requiring hearings under both the teachers' tenure act and the Michigan labor relations statutes, with review of the former by the circuit court and of the latter by the Court of Appeals, could result in competing claims and conflicting adjudications with untoward and costly delay.

Public employees may be disciplined under §6 of the PERA only for engaging in *concerted* strike action,[13] while most disciplinary actions subject to the jurisdiction of the State Tenure Commission concern individual teachers. It should therefore be a rare case where the line separating disputes subject to the jurisdiction of the State Tenure Commission from those subject to the jurisdiction of the MERC will be unclear.

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[12] *Paw Paw Board of Education v Paw Paw Education Association*, 1973 MERC 668; *Summerfield School Dist v Summerfield Education Association*, 1969 MERC 439.

[13] The present definition of strike as "concerted" activity represents a change from the Hutchinson Act under which a *single* employee, acting alone, could strike. *See* Howlett, *Michigan's New Public Employment Relations Act*, 45 Mich St B J 12, 14 (April, 1966).

The Crestwood teachers have asserted that they justifiably withheld their services because they had not been able to negotiate a new labor contract since August, 1973. No claim is or could be made that the discharges were occasioned by any cause other than the labor dispute.

Excluding from the jurisdiction of the State Tenure Commission discharges for concerted strike action will not impede the goals sought to be achieved by enactment of the teachers' tenure act. These goals, as set forth in *Rehberg v Ecorse School Dist No 11*, 330 Mich 541, 545; 48 NW2d 142 (1951), quoting cases from foreign jurisdictions, are to "maintain an adequate and competent teaching staff, free from political and personal arbitrary interference"; to promote "good order and the welfare of the State and of the school system by preventing removal of capable and experienced teachers at the personal whims of changing office holders"; and "to protect and improve State education by retaining in their positions teachers who are qualified and capable and who have demonstrated their fitness, and to prevent the dismissal of such teachers without just cause". [14]

This construction of the two acts will not enable MERC to circumvent, at the request of school boards, the protection provided tenured teachers by the teachers' tenure act. If the school board claims that a teacher was discharged for striking, the appeal is to the circuit court, not to MERC. If the school board claims that the teacher was discharged

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[14] Apart from the field of labor relations, the right of tenured teachers to a hearing has not been thought to require a prior hearing in every case. The State Tenure Commission has held, and the Court of Appeals affirmed, that the notice and hearing provisions in the teachers' tenure act do not apply "in cases of reduction of personnel due to economic reasons." *Steeby v School Dist of Highland Park*, 56 Mich App 395, 396; 224 NW2d 97 (1974).

for a reason other than striking, MERC's jurisdiction is invoked only if the teacher claims he was discharged for activity protected under the PERA and the teacher himself files an unfair labor practice charge with the MERC; such a charge would not preclude the teacher from also defending against the discharge at a teachers' tenure act hearing on the ground that it was not supported by reasonable and just cause.

III

Whether a teacher's employment can be terminated, consistent with the Due Process Clause, without a hearing need not be decided. The PERA provides for a hearing.

The claim that the Due Process Clause requires a *prior* hearing in every case of deprivation of a property right has been rejected by the United States Supreme Court.[15]

When the government seeks to deprive a person of a property right—and we accept, *arguendo,* that a teacher's statutory rights under the teacher's tenure act constitute property—due process requires a "hearing appropriate to the nature of the case." *Mullane v Central Hanover Bank & Trust Co*, 339 US 306, 313; 70 S Ct 652; 94 L Ed 865 (1950). "The formality and procedural requisites for the hearing can vary, depending upon the importance of the

[15] *See, e.g., Arnett v Kennedy,* 416 US 134; 94 S Ct 1633; 20 L Ed 2d 15 (1974); *Mitchell v W T Grant Co,* 416 US 600; 94 S Ct 1895; 40 L Ed 2d 406 (1974); *North American Cold Storage Co v Chicago,* 211 US 306; 29 S Ct 101; 53 L Ed 195 (1908); *Central Union Trust Co v Garvan,* 254 US 554; 41 S Ct 214; 65 L Ed 403 (1921); *Corn Exchange Bank v Coler,* 280 US 218; 50 S Ct 94; 74 L Ed 378 (1930); *Phillips v Commissioner,* 283 US 589; 51 S Ct 608; 75 L Ed 1289 (1931); *Bowles v Willingham,* 321 US 503; 64 S Ct 641; 88 L Ed 892 (1944); *Fahey v Mallonee,* 332 US 245; 67 S Ct 1552; 91 L Ed 2030 (1947); *Ewing v Mytinger & Casselberry, Inc,* 339 US 594; 70 S Ct 870; 94 L Ed 1088 (1950).

interests involved and the nature of the subsequent proceedings." *Boddie v Connecticut,* 401 US 371, 378; 91 S Ct 780; 28 L Ed 2d 113 (1970). "The types of 'liberty' and 'property' protected by the Due Process Clause vary widely, and what may be required under that clause in dealing with one set of interests which it protects may not be required in dealing with another set of interests." *Arnett v Kennedy,* 416 US 134, 155; 94 S Ct 1633; 40 L Ed 2d 25, 34 (1974). "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Cafeteria Workers v McElroy,* 367 US 880, 895; 81 S Ct 1743; 6 L Ed 2d 1230 (1961).

In its most recent expression on the subject, the Supreme Court in *Arnett v Kennedy, supra,* rejected a due process challenge to a statute allowing the discharge of a Federal employee without a pre-disciplinary evidentiary hearing. A variety of rationales were espoused, but the uniform thrust of each opinion, including the dissents, is that the constitutional necessity of a pre-disciplinary hearing must be determined by balancing the competing interests of the government and employee.

"We have repeatedly observed that due process requires that a hearing be held 'at a meaningful time and in a meaningful manner,' *Armstrong v Manzo*, 380 US 545, 552 [85 S Ct 1187; 14 L Ed 2d 62] (1965), but it remains for us to give content to that general principle in this case by balancing the Government's asserted interests against those of the discharged employee." *Arnett v Kennedy, supra,* 416 US 134, 212 (Marshall, J., dissenting with Brennan and Douglas, JJ.).

When public employees strike, the public employer must, like a private employer, be able to hire substitute em-

ployees so that the public business is not interrupted. In order to hire competent replacements, it may be necessary for the public employer to offer permanent employment and thus displace strikers. Where essential services have been suspended, the hiring of replacements often cannot await time-consuming adjudicatory processes.

The predominant interest secured by pre-disciplinary hearings, as advanced in *Arnett, supra,* is protection against removal of the wrong person and, assuming ultimate employee vindication, protection against interim financial deprivation.

The possibility of removal of a non-striker is minimized when, as here, the school board gives each striking teacher personal notice of the opportunity to return to the classroom before disciplinary action is taken. While on strike, a teacher receives no compensation; striking teachers do not suffer additional interim financial deprivation when disciplined.

IV

The union contends, and we agree, that by striking, the teachers did not cease to be employees.[16] Their employment could only be terminated in accordance with the procedures set forth in § 6 of the PERA.

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[16] *See School Dist for the City of Holland v Holland Education Association,* 380 Mich 314; 157 NW2d 206 (1968). If the employment relationship is severed when an employee strikes, arguably there would be no governing law. The PERA, in terms, governs only relationships between public employers and their public employees.

Under the NLRA, a striking employee remains an "employee" for purposes of the act and remains protected against unfair labor practices. *NLRB v MacKay Radio & Telegraph Co,* 304 US 333, 345; 58 S Ct 904; 82 L Ed 1381, 1390 (1938).

The Michigan labor relations acts are modeled on the National Labor Relations Act (NLRA).[17] In the private sector, the use of economic pressure by the parties to a labor dispute "is part and parcel of the process of collective bargaining." *NLRB v Insurance Agents International Union,* 361 US 477, 495; 80 S Ct 419; 4 LEd 2d 454 (1960). Under the NLRA and the Michigan labor mediation act, the term "employee" includes an employee on strike. Both acts define "employee" as including:

> "any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of [under the NLRA, "any unfair labor practice"/under the labor mediation act, "any act which is illegal hereunder"], and who has not obtained any other regular and substantially equivalent employment."[18]

In construing the Michigan labor mediation act and the PERA, this Court has frequently been guided by the construction placed on the analogous provisions of the NLRA by the NLRB and the Federal courts.[19]

The NLRB and the Federal courts have developed an intricate body of law concerning the reinstatement of strikers. There are many permutations, but certain general principles have emerged. The Federal cases recognize an

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[17] 61 Stat 136 (1947) *et seq.,* 29 USCA 151 *et seq.*

[18] MCLA 423.2; MSA 17.454(2); 61 Stat 137 (1947), 29 USCA 152.

[19] *See Detroit Police Officers Association v Detroit,* 391 Mich 44; 214 NW2d 803 (1974); *Michigan Employment Relations Commission v Detroit Symphony Orchestra, Inc,* 393 Mich 116, 127; 223 NW2d 283 (1974); *Michigan Employment Relations Commission v Reeths-Puffer School Dist,* 391 Mich 253, 260; 215 NW2d 672 (1974).

employer's right to hire replacements for strikers.[20] "Economic strikers" have limited rights of reinstatement.[21] "Unfair labor practice" strikers have an absolute right to reinstatement—unless guilty of misconduct[22]—even if the employer has hired permanent replacements.

Although a strike begins as an economic strike, if it is determined that the employer engaged in an unfair labor practice, the strike may be held to be an unfair labor practice strike and the striking employees entitled to reinstatement.[23]

Since an economic strike is protected concerted activity under the NLRA and the Michigan labor mediation act, it is an unfair labor practice for a private employer

[20] "Although § 13 provides, 'Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike,' it does not follow that an employer, guilty of no act denounced by the statute, has lost the right to protect and continue his business by supplying places left vacant by strikers." *NLRB v McKay Radio & Telegraph Co, supra,* at p 345, Note, *Replacement of Workers During Strikes,* 75 Yale L J 630 (1966).

[21] An economic striker may be entitled to re-employment when the strike ends if his job has not been filled by a permanent replacement. Even when the job has been filled, if a vacancy subsequently occurs economic strikers who have indicated their continued availability have a qualified right to re-employment. *See* Morris, *The Developing Labor* Law (1971), pp 524-529; Note, *Replacement of Workers During Strikes, supra.*

[22] *See* 45 ALR2d 887 Anno: *National Labor Relations Act: Sitdown strike, violence, or similar misconduct during strike as affecting employer's right to discharge employee or employee's right to be reinstated after strike.*

[23] *See NLRB v International Van Lines,* 409 US 48, 52; 93 S Ct 74; 34 L Ed 201 (1972); *Local 833, UAW-CIO,* etc NLRB, 112 US App DC 197, 109; 300 F2d 699, 701 (CA DC, 1962); *NLRB v Guistina Bros Lumber Co,* 253 F2d 371, 373 (CA 9, 1958); *NLRB v Reliance Clay Products Co,* 245 F2d 599 (CA 5, 1957); *NLRB v Waukesha Lime & Stone Co, Inc,* 343 F2d 504, 510 (CA 7, 1965).

to discharge an employee for engaging in an economic strike before the employee has been replaced.[24] The Crestwood school board discharged the school teachers before hiring replacements. However, in contrast with the NLRA and the Michigan labor mediation act, the PERA prohibits strikes in public employment; public employee strikes, therefore, are not protected "lawful concerted [activity] for the purpose of collective negotiation or bargaining or other mutual aid and protection" within the meaning of §9 of the PERA,[25] modeled on §8 of the Michigan labor mediation act[26] and § 7 of the National Labor Relations Act.[27]

The Federal courts have held that a strike may be unlawful either because it has an unlawful purpose or unlawful means are used to accomplish a lawful purpose and strikers who engage in unlawful strike activity may be discharged.[28]

The action of the Crestwood school board in discharging teachers for striking in violation of the provisions of the PERA prior to the hiring of replacements was not violative of that act. It does not necessarily follow, however, that these teachers may not be entitled to reinstatement should MERC determine that the school board engaged in an unfair labor practice.

[24] *See NLRB v International Van Lines, supra.* "[T]he authorities uniformly hold that the discharge of economic strikers prior, as here, to the time their places are filled constitutes an unfair labor practice." *NLRB v Globe Wireless,* 193 F2d 748, 750 (CA 9, 1951).

[25] MCLA 423.209; MSA 17.455(9).

[26] MCLA 423.8; MSA 17.454(8).

[27] 61 Stat 140 (1947), 29 USCA 157.

[28] Resort to violence and the so-called sit-down strike are unlawful means. Jurisdictional strikes and a strike whose aim is featherbedding are strikes for unlawful purposes under the NLRA. *See generally,* Morris, *The Developing Labor Law* (1971), pp 529-535.

V

The union filed an unfair labor practice charge with the MERC which has not been considered on its merits. Its amended charge, filed after the December 30, 1974 discharge of the teachers, asserts that "[a]ny interruptions in the performance of teaching duties by teachers in such district have been directly provoked and instigated by the unfair labor practices of respondent employer."

If MERC should determine that the employing school district committed an unfair labor practice, MERC *may*, despite the illegality of the teachers' strike, order reinstatement.

The distinction between administrative agencies and equity courts in the application of the "clean hands" doctrine was early recognized by the NLRB and the Federal courts in implementing the Congressional mandate that upon the finding of an unfair labor practice the board "take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of the [NLRA]."[29] "Equally untenable is the contention that the strikers are not entitled to reinstatement because they have not come into court with clean hands This principle is not applicable to a proceeding in which a governmental agency is seeking enforcement of its order in the public interest." *Republic Steel Corp v NLRB*, 107 F2d 472, 479 (CA 3, 1939) *modified on other grounds*, 311 US 7; 61 S Ct 77; 85 L Ed 6 (1940).[30]

The language of the Michigan labor mediation act spelling out the remedial authority of the MERC upon finding

[29] NLRA § 10(c), 61 Stat 147 (1747), 29 USCA 160(c).

[30] *See* Chafee, *Coming Into Equity with Clean Hands*, 47 Mich L Rev 1065, 1080-1081 (1949).

an unfair labor practice is identical to the corresponding language of the NLRA.[31]

If the MERC finds that an unfair labor practice or other misconduct was committed by both sides, it should balance the competing equities to reach a result best effectuating the goals of the act.

> "Where an employer who has committed unfair labor practices discharges employees for unprotected acts of misconduct, the Board must consider both the seriousness of the employer's unlawful acts and the seriousness of the employees' misconduct in determining whether reinstatement would effectuate the policies of the Act. Those policies inevitably come into conflict when both labor and management are at fault. To hold that employee 'misconduct' automatically precludes compulsory reinstatement ignores two considerations which we think important. First, the employer's antecedent unfair labor practices may have been so blatant that they provoked employees to resort to unprotected action. Second, reinstatement is the only sanction which prevents an employer from benefiiting from his unfair labor practices through discharges which may weaken or destroy a union." *Local 833, UAW-AFL-CIO, etc v NLRB*, 112 US App DC 107, 110-111; 300 F2d 699, 702-703 (1962). Upon remand *Kohler Co*, 148 NLRB 1434 (1964); *aff'd* 120 US App DC 259; 345 F2d 748 (1965); *cert den* 382 US 836; 86 S Ct 82; 15 L Ed 2d 79 (1965).

In this case, teachers sought review under § 6. Because of the pendency of this litigation, § 6 hearings have not

[31] "[T]o take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this act." MCLA 423.216(b); MSA 17.455(16)(b).

been conducted. The hearings may now proceed or, if the parties agree, be deferred until determination by MERC of the unfair labor practice charges.

A § 6 hearing is of limited inquiry. Its sole purpose is to determine whether the employer correctly identified the particular employee as a violator of the act's prohibition against striking. Since the hearing will ordinarily be conducted by the employer, as the officer or body having general disciplinary authority, a § 6 hearing is not an appropriate forum for the employee to assert in defense the employer's violation of the act. Allegations of or defenses premised upon employer misconduct are the exclusive province of the MERC to resolve upon the filing of an unfair labor practice charge.

Even if it should be determined in §6 hearings that particular teachers have violated the provisions of the PERA by striking and those determinations are sustained on review, if MERC orders reinstatement of striking teachers because it determines that this affirmative action will best effectuate the policies of the act" and that determination is sustained on review, the teachers shall be reinstated.[32]

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[32] To determine whether employee misconduct will bar reinstatement, the NLRB and the United States Courts of Appeals consider the gravity of the misconduct in light of the employer's unfair labor practices and discriminatory discharges. Note, *Strike Misconduct as Grounds for Denial of Reinstatement*, 32 NYU L Rev 839, 843 (1957); Sahm, *Picket-Line Misconduct and Employee Reinstatement*, 56 ABAJ 561 (1970); Lipton. *Misconduct in Concerted Activities Under the NLRA*, 8 Labor L J 299 (1957).

In the following cases reinstatement was ordered: *NLRB v Thayer Co*, 213 F2d 748 (CA 1, 1954), *cert den* 348 US 883; 75 S Ct 123; 99 L Ed 694 (1954) (improper strike; discriminatory discharge); *NLRB v Thor Power Tool Co*, 351 F2d 584 (CA 7, 1965) (abusive language; discriminatory discharge); *Allied Industrial Workers, AFL-CIO Local*

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VI

The status of the teachers presently in the classrooms pending resolution by MERC of the unfair labor practice charges is of considerable importance to the school children, parents, and school board, as well as to the teachers.

The teachers were reinstated pursuant to the Court of Appeals order of January 17, 1975. In granting leave we did not stay that aspect of that order.

Section 16(h) of the PERA[33] provides that MERC shall have the power, upon issuance of a complaint charging that any person has engaged in or is engaging in an unfair labor practice, to petition the circuit court for "appropriate temporary relief or restraining order" and that the circuit court shall have jurisdiction to grant "to the

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Union No. 289 v NLRB, 155 US App DC 112; 476 F2d 868 (1973) (following a car to coerce and harass the occupants not to report to work; employer unfair labor practice); *NLRB v Wallick*, 198 F2d 477 (CA 3, 1952) (unreported strike; employer unfair labor practice); *NLRB v Wichita Television Corp*, 277 F2d 579 (CA 10, 1960) (mass picketing, blocking doorway, heckling; discriminatory discharge); *NLRB v Elkland Leather Co*, 114 F2d 221 (CA 3, 1940) (throwing stones at cars of "loyal" employees; employer unfair labor practice).

In the following cases reinstatement was denied: *Seminole Asphalt Refining, Inc v NLRB*, 497 F2d 247 (CA 5, 1974) (throwing cherry bombs into company property near storage tanks containing flammable petroleum; employer unfair labor practice); *NLRB v Big Three Welding Equipment Co*, 359 F2d 77 (CA 5, 1966) (pilfering company's property; discriminatory discharge); *NLRB v R C Can Co*, 340 F2d 433 (CA 5, 1965) (threat of physical violence discriminatory discharge); *Iowa Beef Packers, Inc v NLRB*, 331 F2d 176 (CA 8, 1964) (giving false testimony at hearing on unfair labor practice charge; unfair labor practice); *NLRB v Longview Furniture Co*, 206 F2d 274 (CA 4, 1953) (profanity, insults and strking of employee who attempted to continue working; employer unfair labor practice).

[33] MCLA 423.216; MSA 17.455(16).

board [MERC]" such temporary relief or restraining order as it deems just and proper.[34]

When the union filed with MERC the amended unfair labor practice charge against the school board on January 6, 1975, it requested the Commission to seek immediate relief in the circuit court pursuant to § 16(h). The director of the MERC responded the same day: "It has been the consistent policy of this Commission to refrain from petitioning for temporary relief or a restraining order under the provisions of Section 16(h) of the act. Therefore, your request is denied and the charges filed in the matter will be processed in accordance with established statutory procedures."

Whatever the reasons for this policy—financial or personnel limitations or other—the Commission may not properly adopt an arbitrary policy of refusing to consider exercising, without regard to the circumstances, power conferred upon it by the PERA.

The Commission should consider and decide the union's request. If the Commission persists in its refusal to act on the request, it would appear that an order should enter directing it to do so.[35]

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[34] The same provision is to be found in § 23(i) of the labor mediation act. MCLA 423.23; MSA 17.454(25).

[35] Our view that MERC should exercise its discretion regarding the teacher's request in no way portends judicial review of MERC's discretion. See Anno: *Availability of Independent Suit in Federal District Court to Attack Action Taken or Order Issued by National Labor Relations Board*, 2 ALR F 376, 399-400, § 6(c); Morris, *The Developing Labor Law*, 873-878. We simply hold that an administrative agency empowered to exercise discretion abuses its discretion and errs as a matter of law when it absolutely refuses in every and any instance to exercise its discretion.

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VII

The Court of Appeals ordered the school board and the union to submit this dispute to compulsory arbitration.

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MERC's power under § 16(h) of the PERA to seek an injunction in circuit court is identical to the NLRB's discretionary power under § 10(j) of the NLRA to seek such relief in Federal district court. For discussions of § 10(j)'s legislative history and its implementation by the NLRB and Federal courts see, Seigel, *Section 10 (j) of the National Labor Relations Acts Suggested Reforms for an Expanded Use*, 13 Boston Col Ind & Comm L Rev 457 (1972); Note, *Temporary Injunctions under Section 10 (j) of the Taft-Hartley Act*, 44 NYU L Rev 181 (1969).

The NLRB Field Manual lists guidelines used by the NLRB in considering whether to seek § 10(j) relief:

1. The clarity of the alleged violations;

2. Whether the case involves the shutdown of important business operations which, because of their special nature, would have an extraordinary impact on the public interest;

3. Whether the alleged unfair labor practices involve an unusually wide geographic area, thus creating special problems of public concern;

4. Whether the unfair labor practices create special remedy problems so that it would probably be impossible either to restore the status quo or effectively dissipate the consequences of the unfair labor practices through resort to the regular procedures provided in the Act for NLRB order and subsequent enforcement proceedings;

5. Whether the unfair labor practices involve interference with the conduct of an election or constitute a clear and flagrant disregard of NLRB certification of a bargaining representative or other NLRB procedures;

6. Whether the continuation of the alleged unfair labor practices will result in exceptional hardship to the charging party;

7. Whether the current unfair labor practice is of a continuing or repetitious pattern;

8. Whether, if violence is involved, the violence is of such a nature as to be out of control of local authorities or otherwise widespread and susceptible of control by § 10(j) relief.

NLRB Field Manual, §10310.2 (reprinted in 48 Am Jur, Labor and Labor Relations, §1016 [1974 supp], p 127).

The union defends this directive on the ground that, having sought equity, the school board may apropriately be required to do equity. It is asserted that a court of equity has the power to grant "complete relief", to "order done what ought to be done," and to enter such orders as may be in the "public interest" and as "appeal to the conscience of the chancellor" so as to provide a remedy consonant with its directive that the teachers 'work under conditions they had never agreed to and which remain patently obsolete in a period of mounting inflation. The court refused to impose continued 'involuntary servitude' without providing a rational means of resolving the impasse between two stubborn parties."

The Court of Appeals order was predicated on its court-rule-conferred power to "[g]ive any judgent and make any order which ought to have been given or made, and make such other and further orders and grant such relief as the case may require",[36] and its statutory power "to issue any writs, directives and mandates that it judges necessary and expedient to effectuate its determination of cases brought before it."[37]

The union relies on cases where special masters, receivers or monitors were appointed. But in every such case, the person so appointed was authorized to exercies a power which the judge, if not otherwise preoccupied, could himself exercise. A special master, receiver or monitor exercises the powers conferred upon him subject to the judge's power to substitute his own independent judgment at any time for the judgment of the special master, receiver or monitor unimpeded by the limitations generally pertaining

[36] GCR 1963, 820.1(7).

[37] MCLA 600.310; MSA 27A.310.

when a court sits in judicial review of an arbitartor's decision.

If the compulsory arbitration ordered by the Court of Appeals contemplated the kind of supervision a judge exercises over a special master, receiver or monitor or the kind of plenary equitable power a chancellor possesses, then, in the final analysis, the court itself would be called upon to decide the contract terms, to write a contract for the parties. If it was contemplated that the court would sit in judicial review of the compulsory arbitrator's decision, then the special master-receiver-monitor analogy is inapposite.

While the PERA obliges a public employer to bargain collectively with the representatives of its employees, it is further provided that "such obligation does not compel either party to agree to a proposal or require the making of a concession".[38]

The Constitution provides that it is the Legislature, not the judiciary, that has the power to "enact laws providing for the resolution of disputes concerning public employees"[39] The Legislature has chosen to provide for the resolution of impasses in collective bargaining only in the case of municipal police and fire department.[40] Apart from that enactment, there is no statute for the resolution of impasses in either public or private collective bargaining.

A court is without power to make a contract for parties or to confer on someone else the power to make a contract

[38] MCLA 423.215; MSA 17.455(15).

[39] Const 1963, art 4,§ 48.

[40] 1969 PA 312; MCLA 423.231 *et seq.*; MSA 17.455(31) *et seq.*

for them. By like token, it cannot compel the parties to confer on someone else the power to make a contract.

A court, in law or equity, may indeed enter all appropriate orders, but only those consistent with the proper discharge of its judicial responsibility. It has been said that there is not a judicial remedy for every wrong or shortcoming in society or in a statutory scheme. The Legislature has left the resolution of collective bargaining impasses in limbo and there are matter shall remain until it chooses to act.

Reversed. No costs, a public question.

T. G. KAVANAGH, C.J. and M. S. COLEMAN and J. W. FITZGERALD, JJ., concurred with LEVIN, J.

WILLIAMS, J. *(for affirmance except as to compulsory arbitration)*. We decide today a significant matter of state-wide importance involving the respective rights and duties of school teachers and a school board engaging in a labor dispute characterized by the teachers' withholding their services and allegations of unfair labor practices on the part of the school board. In resolving the questions presented, the Crestwood school situation places this Court once again in its historic role of preserving traditional rights and fundamental values of the past while accommodating newer rights and requirements dictated by the necessities of the present and the future.

The ultimate and publicly understood issue in this case is—can the school board discharge allegedly unlawfully[1] striking teachers without prior notice and hearing?

[1] The Michigan Employment Relations Commission [hereafter "MERC"] has yet to decide whether or not the school board was guilty of an unfair labor practice thereby "provoking" the withholding of services.

This ultimate issue, however, totally depends upon a threshold issue. The threshold and dispositive issue is narrow and technical—to what extent has the public employment relations act[2] [hereafter "PERA"] repealed the teachers' tenure act,[3] [hereafter "TTA"] by implication, because TTA would clearly provide prior notice and hearing in this case.

The narrow, technical issue in turn depends upon whether the alleged repealing legislation, PERA, contains a discharge provision in conflict with the clear and detailed discharge provisions in TTA so that it can be said that the conflicting PERA provision repeals the TTA provisions by implication because PERA is subsequent legislation.

To begin with then, the *dispositive issue* in this case is—*is there a discharge provision in PERA that conflicts with and repeals the discharge provisions in TTA?*

The fact of the matter is that there is not a single word in PERA affirmatively providing for a discharge procedure. On the contrary, there is a PERA provision that refers outside of PERA to a separate discharge procedure clearly indicating that there is none in PERA.[4] As a consequence, it is neither legally nor logically appropriate to say that there is a discharge provision in PERA that conflicts with, and hence repeals by implication, the discharge provisions of TTA.

[2] MCLA 423.201 *et seq.*; MSA 17.455(1) *et seq.*

[3] MCLA 38.71 *et seq.*; MSA 15.1971 *et seq.*

[4] "In the event of such request [for a determination whether or not there was a violation of the PERA anti-strike provision] the officer or body shall within 10 days commence a proceeding for the determination of whether the provisions of this act have been violated by the public employee, *in accordance with the law and regulations appropiate to a proceeding to remove the public employee.*" (Emphasis added.) MCLA 423.206; MSA 17.455(6).

The school board and Justice LEVIN's opinion, however, attempt to *infer* a conflicting discharge provision in PERA, since they cannot refer to any provision which in so many words sets up a discharge provision, for the simple reason that, in fact, there isn't any It is submitted that it is legally unacceptable to construe repeal of a well-established statutory provision by a mere inference in a subsequent statute, especially when the meaning of that inference is dubious at the best.

As to the dispositive issue, bearing in mind this Court's duty to reasonably and harmoniously construe legislation bearing on the same subject matter, and bearing in mind as well our duty to protect basic rights once granted by legislation or otherwise, it is our opinion that there is no PERA discharge provision that conflicts with, and hence repeals by implication, the traditional rights of notice and hearing prior to discharge which are at the heart of TTA. As a consequence, we affirm the Circuit Court order of January 10, 1975, and the Court of Appeals result minus "compulsory" arbitration.

I—*Facts*

Our Brother LEVIN cogently recites the factual background in this case in Section I of his opinion. It is worth noting, in addition to that recitation, that the circuit court based its order of January 10, 1975, setting aside the board's discharge resolution of December 30, 1974, and reinstating the teachers, on the failure of the board to follow the procedural requirements of TTA, which a majority of that Court, Judges Bowles and Roumell,[5] found to be controlling in this situation. The Court of Appeals, while unanimous in its affirmation of the circuit court order and finding of procedural infirmity, based on its decision not on TTA alone but rather on a blend of the requirements of TTA and PER, §6,[6] the latter, the Court holding, being controlling in the two "irreconciliable" instances of conflict which it found.

II—*Pertinent Statutory Provisions*

The critical statutory provisions of TTA and PERA — read as follows:

TTA

> "The controlling board, if it decides to proceed upon • • • charges, [against a teacher] shall furnish the teacher with a written statement of the charges including a statement of the teacher's rights under this article, and shall, at the option of the teacher, provide for a hearing to take place not less than 30 nor more than 45 days after the filing of such charges." MCLA 38.102; MSA 15.2002.
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> "Any hearing held for the dismissal or demotion of a teacher, as provided in this act, must be concluded by a decision in writing, within 15 days after

[5] It is significant to note that both Judge Bowles and Judge Roumell have had distinguished backgrounds in labor law. Judge Roumell has previously served as Director of the Michigan office of the NLRB, as Director of the Michigan Employment Security Commission, and as the first Director of the Michigan Department of Labor. Judge Bowles, in addition to a distinguished career as a labor arbitrator in private practice, served as Chairman of a Labor Mediation Board in another state, and as Chairman of the NLRB Detroit field division.

[6] MCLA 423.206; MSA 17.455(6).

the termination of the hearing. A copy of such decision shall be furnished the teacher affected within 5 days after the decision is rendered." MCLA 38.104(f); MSA 15.2004(f).

"A teacher who has achieved tenure status may appeal any decision of a controlling board under this act within 30 days from the date of such decison, to a state tenure commission." MCLA 38.121; MSA 15.-2021.

PERA § 6

"Notwithstanding the provisions of any other law, any person holding such a position who, by concerted action with others, and without the lawful approval of his superior, willfully absents himself from his position, or abstains in whole or in part from the full, faithful and proper performance of his duties for the purpose of inducing, influencing or coercing a change in the conditions or compensation, or the rights, privileges or obligations of employment shall be deemed to be on strike but the person, upon request, shall be entitled to a determination as to whether he did violate the provisions of this act. The request shall be filed in writing, with the officer or body having power to remove or discipline such employee, within 10 days after regular compensation of such employee has ceased or other discipline has been imposed. In the event of such request the oficer or body shall within 10 days commence a proceeding for the determination of whether the provisions of this act have ben violated by the public employee, in accordance with the law and regulations appropriate to a proceeding to remove the public employee. The proceedings shall be

undertaken without unnecessary delay. The decision of the proceeding shall be made within 10 days. If the employee involved is held to have violated this law and his employment terminated or other discipline imposed, he shall have the right of review to the circuit court having jurisdiction of the parties, within 30 days from such decision, for determination whether such decision is supported by competent, material and substantial evidence on the whole record".

III—*Applicable Rules of Statutory Construction*

General comparison of the pertinent sections of TTA and PERA above indicates that they are statutes *in pari materia*. It is therefore our duty to harmonize them if we can:

"[I]f the courts can by any fair, strict or liberal construction find for the two provisions a reasonable field of operation, without destroying their evident intent and meaning, preserving the force of both, and construing them together in harmony with the whole course of legislation upon the subject it is their duty to do so." *Rathbun v State of Michigan,* 284 Mich 521, 544-545; 280 NW 284 (1938), quoting with approval from *State ex rel Ellis v Givens,* 48 Fla 165, 174; 37 So 308 (1904).

See also *Borden, Inc v Department of Treasury,* 391 Mich 495, 511, 523; 218 NW2d 667 (1974) (Opinion of WILLIAMS, J.).

Additionally, insofar as TTA and PERA cannot be reconciled and one act is in conflict with the other, PERA as the later legislation will be deemed to supersede TTA *pro tanto*. The Court of Appeals properly ctied the general

rule in this regard from *Wayne County Civil Service Commission v Board of Supervisors,* 384 Mich 363, 373; 184 NW2d 201 (1971):

> "This is not to say that the act of 1965 repeals outright the act of 1941. Respecting as always our long since declared and regularly maintained rule that repeals by implication are not favored, and that it is only when the two measures in view are so incompatible that both or all cannot fully stand, we can only find that this is a striking instance for application of that rule which, back in 1877, was written into the Court's opinion of *Breitung v Lindauer* (1877), 37 Mich 217, 233:
>
> "'The rule is that the latter act operates *to the extent of the repugnancy,* as a repeal of the first, or, if the two acts are not in express terms repugnant, yet if the latter *covers the whole subject of the first,* and contains new provisions showing that it was intended as a substitute, it will operate as a repeal.'" (Footnote omitted.)

Further, there is a voluminous case law standing for the proposition that a "repugnancy" pronounced enough as to work a repeal by implication "must be clear and unavoidable"[7]—if the allegedly conflicting statutes "can be reconciled and a purpose found to be served by each", then there is no conflict. *Detroit Police Officers Association v City of Detroit,* 391 Mich 44, 65; 214 NW2d 803 (1974). The guiding principles of construction in this context are as follows:

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[7] "[T]he repugnancy must be clear and unavoidable." *In re Lambrecht,* 137 Mich 450, 455; 100 NW 606 (1904).

> "'Repeal by implication is not permitted if it can be avoided by any reasonable construction of the statutes. *Courvelis v. Michigan Bell Telephone Co.,* 281 Mich 223 [274 NW 771 (1937)]; *People v. Hanrahan,* 75 Mich 611 (4 LRA 751) [42 NW 1124 (1889)]. If by any reasonable construction 2 statutes can be reconciled, and a purpose found to be served by each, both must stand, *Garfield Township v. A. B. Klise Lumber Co.,* 219 Mich 31 [188 NW 459 (1922)]; *Edwards v. Auditor General,* 161 Mich 639 [126 NW 853 (1910)] *People v. Harrison,* 194 Mich 363 [160 NW 623 (1916)]. The duty of the courts is to reconcile statutes if possible and to enforce them, *Board of Control of the Michigan State Prison v. Auditor General,* 197 Mich 377 [163 NW 921 (1917)]. The courts will regard all statutes on the same general subject as part of 1 system and later statutes should be construed as supplementary to those preceding them, *Wayne County v. Auditor General,* 250 Mich 227 [229 NW 911 (1930)]. See, also(*Rathbun v. State of Michigan,* 284 Mich 521 [280 NW 35 (1938)]. *People v. Buckley,* 302 Mich 12, 22 [4 NW2d 448 (1942)].
>
> "'This court has held that only, when 2 acts are so incompatible that both cannot stand, does a later act repeal a former. *In re Estate of Reynolds,* 274 Mich 354, 360 [264 NW 399 (1936)]." *Valentine v Redford Twp Supervisor,* 371 Mich 138, 144; 123 NW2d 227 (1963).

See also *In re Lambrecht,* 137 Mich 450, 455; 100 NW 606 (1904); *Garfield Twp v A. B. Klise Ludmber Co,* 219 Mich 31, 35; 188 NW 459 (1922); *Saginaw City Council v Saginaw Board of Estimates,* 256 Mich 624; 633; 239 NW 872 (1932), and citations collected therein.

IV—*Does PERA Provide a Discharge Procedure in Conflict with TTA?*

TTA, as the statutory excerpts set out in Part II above indicate, provides a very specific discharge procedure including furnishing written charges along with a statement of the teacher's rights, a hearing no less than 30 nor more than 45 days after filing charges, and a decision in writing within 15 days of the conclusion of the hearing, which must be furnished the teacher within 5 days after it is rendered.

TTA is in effect "the teachers' Magna Charta."[8] The heart of it is this guarantee of due process in any discharge proceeding, especially prior notice and hearing.

It must be presumed therefore that if the Legislature should decide to repeal what it had so specifically granted it would not do so in an offhand manner but by specific repeal or repeal by implication clear beyond peradventure. As we said in *Rathbun v State of Michigan,* 284 Mich 521, 544; 280 NW 35 (1938), quoting 59 CJ, p 1051:

> "it will not be presumed that the legislature, in the enactment of a subsequent statute, intended to repeal an earlier one, *unless it has done so in express terms* • • • ." (Emphasis added.)

Without question, PERA provides no specific repeal of TTA discharge procedure. Does PERA repeal TTA's discharge procedure by implication by setting up a discharge procedure in direct, unavoidable conflict? The answer is that it does not.

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[8] *Cf. Shifer v Board of Education of Gibraltar School Dist,* 393 Mich 190, 209-210; 224 NW2d 255 (1974) (Opinion of Williams, J.).

Nowhere in PERA is any discharge procedure set up. PERA does not specify that there must be notice and hearing before discharge. PERA does not specify that notice and hearing are not necessary before discharge. PERA § 6 does not provide in any way, shape, or fashion the mechanism or authority for a discharge or disciplinary proceeding.

What PERA does set up is a procedure in its own words to be "a determination as to whether he [the alleged striker] did violate the provisions of this act". The pertinent language is:

> "[the alleged striker] shall be entitled to a determination as to whether he did violate the provisions of this act. The request shall be filed in writing within 10 days after regular compensation of such employee has ceased or other discipline has been imposed."

This hearing obviously is not a discharge or discipline hearing because it is only requested *after* discharge or discipline. In establishing the rules of conduct for such a determination, there is specific reference to a body of rules outside of PERA, which, in this case, Justice LEVIN's opinion agrees is TTA. The text here referred to is as follows:

> "In the event of such request [for a determination whether or not there was a violation of the PERA antistrike provision] the officer or body shall within 10 days commence a proceeding for the determination of whether the provisions of this act have been violated by the public employee, *in accordance with the law and regulations appropriate to a proceeding to remove the public employee.*" (Emphasis added.)

In short, since PERA does not set up a discharge procedure itself and specifically refers outside of PERA for such a procedure, it cannot be said, following the rules of statutory construction set out in Part III of this opinion, that PERA by implication has repealed the discharge procedure in TTA.

As a matter of fact, not only is there no statutory repugnancy here, it is perfectly possible and reasonable to read these statutes together, *i.e.*, a PERA hearing shall occur only after there has been discipline imposed following the procedural dictates of TTA.[9] We recognize that some might feel that the TTA time limits and requirements, though not by any means unduly long, might better be shortened to meet the exigencies of strike situations. This approach was in fact taken by the Court of Appeals in this case. However, we do not write legislation; the time periods involved are properly matters for legislative consideration and action.

Accordingly, as outlined above, we hold that the Crestwood Board of Education erred in discharging the subject teachers summarily, without prior notice and hearing, and without reference to the applicable provisions of TTA.

[9] The Legislature's action in 1967 amending MCLA 38.102; MSA 15.2002, well after the date of enactment of PERA, could be said to indicate a reaffirmation of legislative intent to preserve the discharge notice and hearing provisions in TTA. 1967 PA 216.

V—*Contrary Contention*

The opinion of our learned Brother LEVIN, however, states:

> "Section 6 of the PERA empowers the officer or body generally having disciplinary authority over an employee to terminate the employment of or impose other discipline on an employee who strikes in violation of the PERA. In providing that an employee's request for a hearing to determine whether he did violate the PERA be filed within ten days *after* regular compensation has ceased or other discipline has been imposed, the Legislature manifested an intention that the officer or body may impose discipline without a prior hearing."

The conclusion reached in the first sentence is inferred in the second sentence from the following language in PERA § 6:

> "Notwithstanding the provisions of any other law, any person holding such a position who, by concerted action with others * * * absents himself * * * shall be deemed to be on strike but the person, upon request, shall be entitled to a determination as to whether he did violate the provisions of this act. The request shall be filed in writing, with the officer or body having power to remove or discipline such employee, within 10 days after regular compensation of such employee has ceased or other discipline has been imposed. * * * "

Nowhere in this PERA language is there any description of a removal procedure. All there is is a description of a procedure for a determination as to violation of the

PERA anti-strike provision *after* there has been a removal proceeding in no way described in PERA.

Consequently, the best that can be said for the conclusion in our Brother LEVIN's opinion that PERA provides a procedure for discharge is that it is based on an inference. It certainly is not set out in so many words in PERA.

So the first question is—can there be a repeal by implication where the conflicting provision proposed to substitute for a well-established and precise provision is no more than a possible precise interference? Let us recall the direct *Rathbun* reference to this:

> "[I]t will not be presumed that the legislature, in the enactment of a subsequent statute, intended to repeal an earlier one, *unless it has done so in express terms* • • • ." (Emphasis added.) 284 Mich 521, 544.

But the second question is even more damaging—can there be an inference from the above quoted PERA language that not only is there a removal procedure specified but that what is specified is discharge without prior notice and hearing? Surely this is too much—a true nonsequitur.

Certainly the fact that an alleged striker has the right to contest the alleged violation of PERA within ten days after he has been disciplined, discharged or his pay stopped says nothing as to how his discipline or discharge was accomplished, *i.e.*, with or without prior notice or with or without prior hearing. This is the pertinent language of the act:

> "[The alleged striker] shall be entitled to a determination as to whether he did violate the provisions of this act. The request shall be filed in writing • • • within 10 days after regular compensation of such employee has ceased or other discipline has been imposed."]

All it says is that after the alleged striker has been disciplined, he may request a hearing, nothing more—not a single word as to how the discipline was imposed.

Consequently, it is submitted this kind of an inference supplies no basis whatsoever to conflict with and repeal by implication a specific provision for the traditional prior notice and hearing provided in TTA.

In passing, it may be noted as well that the force of the phrase "[n]otwithstanding the provisions of any other law", which Justice LEVIN heavily relies upon in his analysis, focuses on establishing that the described concerted action "shall be deemed to be [a] strike" and, possibly, to the right of the person to request a determination as to whether he was or was not in violation.

We also take note that the opinion of Justice LEVIN expresses a commendable concern that there be in Michigan under aegis of PERA/MERC, similar to the Federal pattern of NLRA/NLRB, a unitary procedure for the discipline of public employees who strike. This is a concern, as Justice LEVIN's opinion points out, that this Court as a whole shares, in his opinion, Justice LEVIN has pushed this concern further than the Legislature has given any warrant, and at too great a cost in established human rights.

It must be recognized that there is at least one significant difference between the NLRA/NLRB and PERA/MERC patterns, that is that the Congress in establishing the self-contained NLRA/NLRB system specifically recognized and bottomed the system on the right to strike to balance em-

ployer power and labor power.[10] As the United States Supreme Court noted in *Division 1287, Amalgamated Association of Street, Electric Railway & Motor Coach Employees v Missouri,* 374 US 74, 82; 83 S Ct 1657; 10 L Ed 2d 763 (1963), *reh den,* 375 US 870; 84 S Ct 29; 11 L Ed 2d 100 (1963):

> "Collective bargaining, with the right to strike at its core, is the essence of the federal scheme."

On the other hand, the Michigan Legislature in PERA § 6 went back to the Hutchinson Act which was specifically "[a]n act to prohibit strikes by certain public employees".[11] To compensate for the lack of strike power, the Legislature over the years had guaranteed to public employees specific rights and procedures, among them those outlined in TTA. These rights and procedures, to a greater or lesser extent, carried over with PERA.

Historically and legally, therefore, while PERA was a big step forward by the Legislature in responding to the constitutional mandate to establish a system of collective bargaining for public employees,[12] it is common knowledge that PERA did not in and of itself establish a clear, unified system but rather staked out a new system co-existing with an old system, with a murky gray area of operation and ap-

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[10] *See* 61 Stat 140 (1947), 29 USC 157 which reads in pertinent part:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, *and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection* * * *." (Emphasis added.)

[11] 1965 PA 379.

[12] Const 1963, art 4, § 48.

plicability in between them.[13] The all too vivid judicial history in recent years of conflicting and ineffectual relations to ever-worsening school labor relations has highlighted and increased public awareness and understanding of the legislative hiatus in the interlock between PERA and TTA.

Justice LEVIN has courageously applied his very considerable legal and forensic talents to terminate this legislative mish-mash. His opinion has produced a new order under the aegis of PERA/MERC, but at the cost of eliminating the important and traditional rights of notice and hearing before discharge and at the further cost of blinking at the recognized rules of statutory construction.

We concede that the result of our opinion is not as tidy as that of Justice LEVIN's opinion and leaves much for the Legislature to do.[14] We reach this result not out of any overwhelming reluctance to utilize the full potential of judicial power but through the recognition that the proper balance of administrative order and efficiency on the one hand, and personal rights on the other, necessary to meet the complex demands of teacher-school board relations at this time of extreme tension is not a matter that lends itself to the limited options of judicial construction of the material before us but requires the most comprehensive, as well as the wisest, employment of the Legislature's politi-

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[13] *See* for example, Detroit Free Press, March 7, 1975, p 8-A (Editorial).

[14] We are aware that in reaching this conclusion spelled out above, we outline a procedural system containing, potentially, some redundancy. For example, in cases where discharge proceedings are commenced solely on the basis of alleged participation in an unlawful strike, the question of participation in the strike can be raised *both* in the TTA hearing *and* in the PERA § 6 hearing. We do not, however, make legislation, we can only interpret and construe what we are given by the Legislature.

cal and drafting skills. As a matter of fact, the Legislature is this very moment vigorously and exhaustively examining the subject, and the media have expressed the hope that a new solution carefully balancing all the equities is in the making. Under these circumstances and at this time, we feel the Legislature is best equipped to tackle the larger policy decisions and this Court can better serve the public by solving this case on the fundamentals of legislative construction, pointing out such anomalies in the PERA/TTA interlock as this case has brought to our attention.

VI—*Teachers Remained Employees Under Tenure Act While on Strike*

The Crestwood School Board further contends that the discharged teachers, by striking "discontinued their services" within the meaning of Art V, § 1 of the teachers' tenure act, MCLA 38.111; MSA 15.2011,[15] thereby forfeiting the procedural safeguards of that act. This is an issue which this Court specifically reserved for decision in *Shiffer v Board of Education of Gibraltar School Dist,* 393 Mich 190, 201-203; 224 NW2d 255 (1974).

We agree with Justice LEVIN's analysis on this point, in Section IV of his opinion, concluding that "by striking, the teachers did not cease to be employees". In addition, we note that in this case there was a contractual employ-

[15] MCLA 38.111; MSA 15.2011, reads:

"No teacher on continuing tenure shall discontinue his services with any controlling board except by mutual consent, without giving a written notice to said controlling board at least 60 days before September first of the ensuing school year. Any teacher discontinuing his services in any other manner than as provided in this section shall forfeit his rights to continuing tenure previously acquired under this act."

ment relationship between the board and the teachers during the fall of 1974, though the specific terms of that contractual relationship were court-ordered, and that the teachers had actually been working on the job.[16] *School Dist for the City of Holland v Holland Education Association,* 380 Mich 314; 157 NW2d 206 (1968) (Opinions of O'HARA, SOURIS and KELLY, JJ.) *Sf.* OAG 1969-1970, No 4704, p 150 (June 24, 1970).

VII—*Probationary v Tenured Teachers*

The Crestwood School Board further contends that the circuit court and the Court of Appeals erred in their opinions in failing to distinguish between probationary and tenured teachers with respect to the applicability of the procedural provisions of TTA.

Article II, § 4 of the TTA, MCLA 38.84; MSA 15.1984 reads in its entirety as follows:

> "Articles 4, 5, and 6 shall not apply to any teacher deemed to be in a period of probation."

Articles 4 and 6 contain the hearing, review, and other procedural protections and the rights guaranteed by law to tenure teachers.

The fact that probationary teachers are not included in those specific sections does not mean, however, that probationary teachers have no procedural rights at all. As this Court has previously noted:

> "[T]he intent of the *entire* [teachers' tenure] act was to eliminate capricious and arbitrary employment poli-

[16] "On October 8, 1974, Wayne County Circuit Judge Joseph G. Rashid ordered that the teachers return to work and that the Board implement the terms of its proposed salary schedule." Appellant's Brief, p 1.

cies of local school boards. *This includes the probationary as well as the tenure period of employment.*" [Later emphasis added.] *Munro v Elk Rapids Schools,* 383 Mich 661, 688, 691; 178 NW2d 450 (1970) (Dissenting opinion of T. G. KAVANAGH, J.), later *aff'd* in full in *Munro v Elk Rapids Schools,* 385 Mich 618; 189 NW2d 224 (1971) (On Rehearing)

In guarding against such arbitrary and capricious employment policies and, in light of the lack of legislative directive on the issue of the proper procedure to be followed in disciplining or discharging probationary teachers, the courts are forced to act to protect teachers from unreasonable and, potentially, unconstitutional dismissal.[17] *Cf. Hortonville Education Association v Hortonville Joint School Dist,* — Wisc — ; — NW2d — ; 594 GERR F-1 (2-24-75).

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[17] We note that the United States Supreme Court has not found an absolute constitutional right of a probationary teacher to due process protections in dismissal cases. *See Board of Regents of State Colleges v Roth,* 408 US 564; 92 S Ct 2701; 33 L Ed 2d 548 (1972); *Perry v Sinderman,* 408 US 593; 92 S Ct 2694; 33 L Ed 2d 570 (1972). However, the Supreme Court has noted that due process *does* accord protection where, as here, the State, acting through the school administration, makes "any charge against him [the teacher] that might seriously damage his standing and associations in his community * * *. For '[w]here a person's good name reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.'" 408 US 564, 573.

As the Supreme Court of Wisconsin has ruled, referring to *Roth, supra,*

> "It is apparent that such charges [discharge for strike activities] could detrimentally affect an individual's reputation in the labor market and thereby significantly undermine his opportunities for re-employment. Due process requires a notice and hearing and an opportunity for the teachers to clear themselves of such charges." *Hortonville Education Association v Hortonville Joint School Dist,* — Wisc —; — NW2d —; 594 GERR F-1, F-5 (2-24-75)

The Court of Appeals has previously acted in this regard to guarantee the right of review of dismissal to probationary teachers though TTA does not specifically make provision for such review. *Caddell v Ecorse Board of Education,* 17 Mich App 632, 635; 170 NW2d 277 (1969). Such review does not involve the same level of employment termination protection afforded tenure teachers by statute.[18] Tenure teachers may only be discharged for "reasonable and just cause". MCLA 38.101; MSA 15.2001. The discharge of a probationary teacher, however, in the absence of specific legislation or contractual provision on point, is permissible only where it is neither unreasonable nor arbitrary nor beyond the scope of the board's authority. *Caddell, supra,* 636.

Similarly, we hold today, in the absence of specific legislation on point, that probationary teachers have a right to notice and a hearing prior to discharge. Again, probationary teachers are not thereby converted into tenure teachers by virtue of this right — the hearing, if requested promptly, would only be concerned with the issues of whether the employment termination was arbitrary and unreasonable, or whether it was action outside the scope of the board's authority, rather than the broader issues of "reasonable and just cause" for discharge in the case of tenure teachers who have been given broader statutory protection.

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[18] "Assuming the necessity of eliminating 'capricious and arbitrary employment policies' of local school boards, that requirement can be satisfied by forcing the school board to supply a reason for not rehiring and to afford the teacher an opportunity to respond and be heard. The difference between probationary and tenure teachers can still be preserved if in the probationary case courts are permitted 'to respect bases for non-retention enjoying minimal factual support and bases for non-retention supported by subtle reasons.'" (Footnote omitted.) "1970 Annual Survey of Michigan Law—Local Government," 17 Wayne L Rev 599, 615 (1971).

Accordingly, we hold that the Crestwood Board of Education erred, *inter alia,* in discharging *both* its probationary and tenured teachers without prior notice and hearings.

VIII—*Circuit Court Injunction Properly Issued*

The board also contends that, in any case, the teachers were not entitled to equitable relief in the form of an injunction due to their lack of "clean hands" in violating a previous circuit court injunctive order of October 22, 1974. The teachers respond, *inter alia,* that appellant school board likewise violated injunctive orders in the course of these protracted proceedings and accordingly, has no cause to complain.

The Court of Appeals agreed with the teachers, noting that "[a]ll three judges in the trial court agreed that both parties were in open, flagrant defiance and in violation of [Judge Rashid's] orders." 57 Mich App 636,—. Dissenting Judge Rashid, on the circuit court, ruling directly on the "clean hands" question, explicitly opined:

> "I feel that both sides have been in error on this score. • • • The fact is that both sides actually violated the terms of the [October 8 and 22, 1974] order."

We will not second-guess the courts below, especially the trial court which has had direct contact with this litigation throughout its course, on this issue. As we have previously ruled in *Thompson v Enz,* 385 Mich 103, 110; 188 NW2d 579 (1971):

> "[A]s a general rule, equity will administer such relief as the nature, rights, facts, and exigencies of the case demand at the close of the trial or at the time of the making of the decree." Quoting from 27 Am Jur 2d, Equity, § 248, p 818.

The circuit court acted within its discretion in issuing its injunction and order of January 10, 1975.

IX—*Court of Appeals Compulsory Arbitration Order Improper*

We do not believe that the *sua sponte* order of the Court of Appeals requiring compulsory arbitration was a proper exercise of judicial discretion in this case.

X—*Conclusion*

We hold, as did the circuit court majority and the Court of Appeals, that appellee teachers were discharged in a procedurally improper manner.

Accordingly, we affirm the Circuit Court order of January 10, 1975. We further affirm the conclusion, except as to compulsory arbitration, but not the analysis of the Court of Appeals. This matter is remanded to Wayne Circuit Court for further proceedings not inconsistent with this opinion.

No costs, a public question being involved.

T. M. KAVANAGH and SWAINSON concurred with WILLIAMS, J.

APPENDIX D

ORDER DENYING APPLICATION FOR REHEARING

(State of Michigan—Supreme Court)

At a Session of the Supreme Court of the State of Michigan, Held at the Supreme Court Room, in the City of Lansing, on the 24th day of June in the year of our Lord one thousand nine hundred and seventy-five.

Present: The Honorable Thomas Giles Kavanagh, Chief Justice; John B. Swainson, G. Mennen Williams, Charles L. Levin, Mary S. Coleman, John W. Fitzgerald, Lawrence B. Lindemer, Associate Justices.

On order of the Court, an application for rehearing having been heretofore submitted herein, it is hereby DENIED.

J. B. Swainson, J., not participating.

G. M. Williams, J., would grant rehearing.

APPENDIX E

AMENDED ORDER

(State of Michigan—Supreme Court)

At a session of the Supreme Court of the State of Michigan, held at the Supreme Court Room, in the City of Lansing, on the 14th day of July in the year of our Lord one thousand nine hundred and seventy-five.

Present the Honorable Thomas Giles Kavanagh, Chief Justice, John B. Swainson, G. Mennen Williams, Charles L. Levin, Mary S. Coleman, John W. Fitzgerald, Lawrence B. Lindemer, Associate Justices.

On order of the Court, an application for rehearing having been heretofore submitted herein, it is hereby DENIED.

Lindemer and Swainson, JJ., not participating.

G. M. Williams, J., would grant rehearing.